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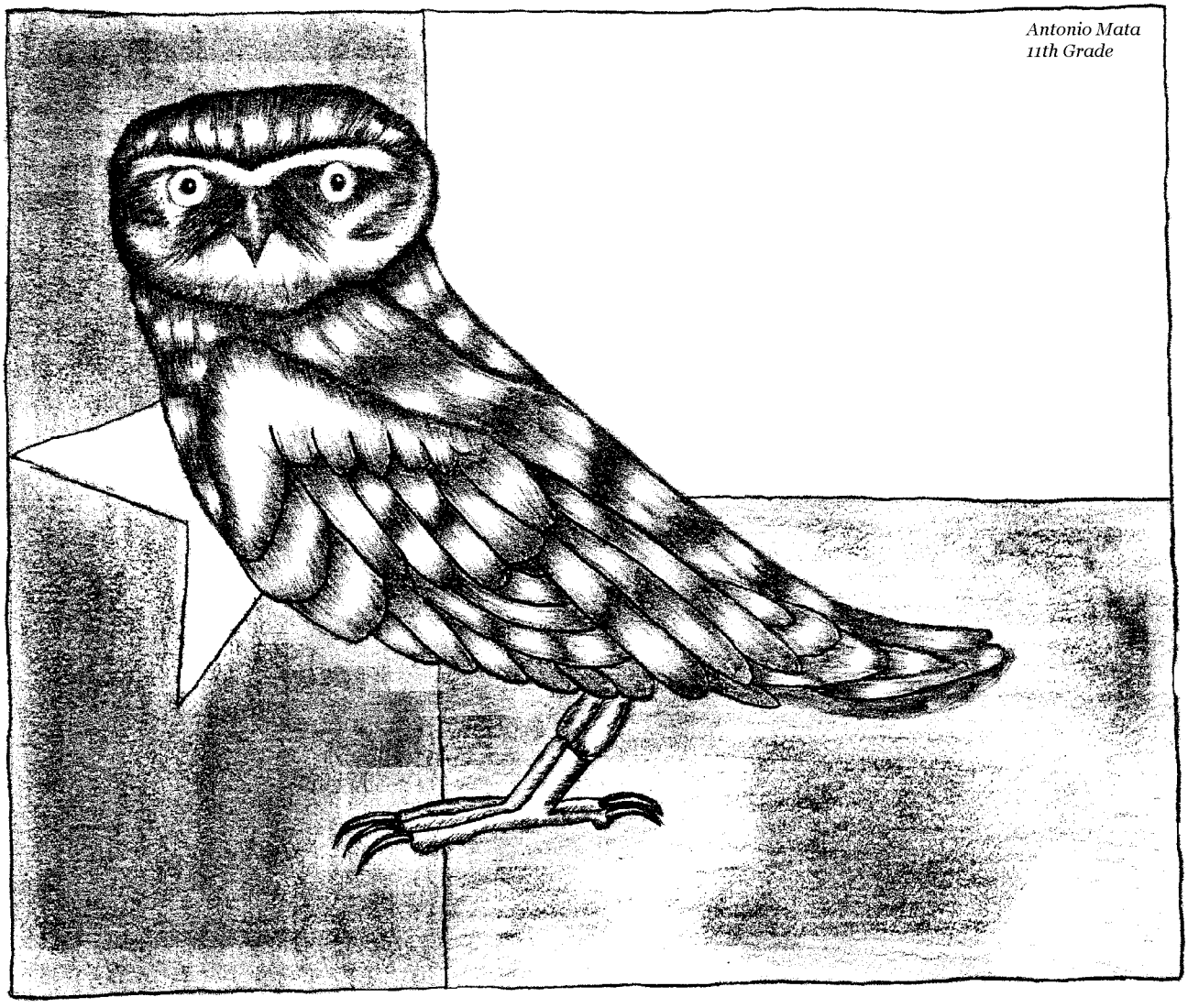

Antonio Mata
11th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

The Texas Commission on the Arts adopts on an emergency basis the repeal and replacement of §35.1 and §35.2, concerning A Guide to Operations, Programs and Services. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously proposes the repeal and replacement of §35.1 and §35.2 for permanent adoption.

The purpose of the repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended December 2005.

These sections are adopted on an emergency basis to enable the Texas Commission on the Arts to get the word out to the arts field about our programs in a timely manner in anticipation of our upcoming annual grants deadline.

13 TAC §35.1, §35.2

(Editor's note: The text of the following sections adopted for repeal on an emergency basis will not be published. The sections may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§35.1. A Guide to Operations.

§35.2. A Guide to Programs and Services.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2005.

TRD-200506008
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective Date: December 21, 2005
Expiration Date: April 19, 2006
For further information, please call: (512) 936-6564

♦ ♦ ♦

13 TAC §35.1, §35.2

The new sections are adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§35.1. A Guide to Operations.

The commission adopts by reference A Guide to Operations (revised December 2005). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

§35.2. A Guide to Programs and Services.

The commission adopts by reference A Guide to Programs and Services (revised December 2005). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Ricardo Hernandez
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CHAPTER 37. APPLICATION FORMS AND INSTRUCTIONS FOR FINANCIAL ASSISTANCE

The Texas Commission on the Arts adopts on an emergency basis the repeal and replacement of §37.24, concerning Application Form and Instructions for Texas Touring Arts Program--Company/Artist. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously proposes the repeal and replacement of §37.24 for permanent adoption.

The purpose of the repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended December 2005.

This section is adopted on an emergency basis to enable the Texas Commission on the Arts to get the word out to the arts field about our programs in a timely manner in anticipation of our upcoming annual grants deadline.

13 TAC §37.24

(Editor's note: The text of the following section adopted for repeal on an emergency basis will not be published. The section may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§37.24. Application Form and Instructions for Texas Touring Arts Program--Company/Artist.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2005.

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13 TAC §37.24

The new section is adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§37.24. Application Form and Instructions for Texas Touring Arts Program--Company/Artist.

The commission adopts by reference the application form and instructions for the Texas Touring Arts Program--Company/Artist as outlined in A Guide to Programs and Services. This document is also available online at www.arts.state.tx.us.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2005.

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Ricardo Hernandez
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For further information, please call: (512) 936-6564

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

The Texas Commission on the Arts proposes the repeal and replacement of §35.1 and §35.2, concerning A Guide to Operations, Programs and Services. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously adopts the repeal and replacement of §35.1 and §35.2 on an emergency basis.

The purpose of the repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended December 2005.

Mary Beck, Director of Finance and Administration, Texas Commission on the Arts, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing the sections as proposed.

Ms. Beck also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the ability to utilize federal and state financial assistance funds in a more effective manner, thereby allowing more Texas organizations, communities, and citizens to participate in agency programs. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. There will be no effect to small or micro businesses.

Comments on the proposal may be submitted to Ricardo Hernandez, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication in the *Texas Register*.

13 TAC §35.1, §35.2

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statute, code, or article is affected by this proposal.

§35.1. A Guide to Operations.
§35.2. A Guide to Programs and Services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2005.

TRD-200506012
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 936-6564

♦ ♦ ♦

13 TAC §35.1, §35.2

The new sections are proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statute, code, or article is affected by this proposal.

§35.1. A Guide to Operations.

The commission adopts by reference A Guide to Operations (revised December 2005). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

§35.2. A Guide to Programs and Services.

The commission adopts by reference A Guide to Programs and Services (revised December 2005). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2005.

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Ricardo Hernandez
Executive Director
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CHAPTER 37. APPLICATION FORMS AND INSTRUCTIONS FOR FINANCIAL ASSISTANCE

The Texas Commission on the Arts proposes the repeal and replacement of §37.24, concerning Application Form and Instructions for Texas Touring Arts Program--Company/Artist. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously adopts the repeal and replacement of §37.24 on an emergency basis.

The purpose of the repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended December 2005.

Mary Beck, Director of Finance and Administration, Texas Commission on the Arts, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing the section as proposed.

Ms. Beck also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the ability to utilize federal and state financial assistance funds in a more effective manner, thereby allowing more Texas organizations, communities, and citizens to participate in agency programs. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There will be no effect to small or micro businesses.

Comments on the proposal may be submitted to Ricardo Hernandez, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication in the *Texas Register*.

13 TAC §37.24

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statute, code, or article is affected by this proposal.

§37.24. Application Form and Instructions for Texas Touring Arts Program--Company/Artist.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2005.

TRD-200506014
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 936-6564

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13 TAC §37.24

The new section is proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statute, code, or article is affected by this proposal.

§37.24. Application Form and Instructions for Texas Touring Arts Program--Company/Artist.

The commission adopts by reference the application form and instructions for the Texas Touring Arts Program--Company/Artist as outlined in A Guide to Programs and Services. This document is also available online at www.arts.state.tx.us.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 27, 2005.

TRD-200506111
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 936-6564

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 70. INDUSTRIALIZED HOUSING AND BUILDINGS

16 TAC §§70.10, 70.20, 70.30, 70.50, 70.60, 70.70, 70.73, 70.75

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at 16 Texas Administrative Code, §§70.10, 70.20, 70.30, 70.50, 70.60, 70.70, 70.73, and 70.75, regarding the Industrialized Housing and Buildings program. The proposed amendments are necessary to implement statutory changes made by Senate Bill 443, 79th Legislature, and to clarify and update requirements for manufacturers and industrialized builders.

The proposed amendment to §70.10(a) would remove from the definition of "commercial structure" language concerning the types of buildings not included in the definition. The substance of that language is moved to the list of exemptions in §70.30(a). The proposed amendment is necessary to reflect changes made by Senate Bill 443, 79th Legislature, to §1202.003 of the Texas Occupations Code. Also in §70.10(a) the definition of "industrialized builder" is amended to include a person who purchases industrialized housing and buildings from other industrialized builders. The purpose of this change is to clarify that industrialized builders may purchase industrialized housing and buildings for sale or lease to the public from either manufacturers or other industrialized builders.

The proposed amendment to §70.20(5) requires an industrialized builder to notify the Department when a module or modular component is sold to another industrialized builder and when an industrialized manufacturer takes possession of units previously reported as shipped to an industrialized builder. The proposed amendments are necessary to clarify that transfers to another industrialized builder includes sales to industrialized builders and to clarify that transfers to a manufacturer also need to be reported to the department so that the department may assure compliance with the installation and site inspection requirements of the statute and rules.

The proposed amendments to §70.30(a) add the exemption of commercial structures that are installed in a manner other than on a permanent foundation and are either not open to the public or less than 1,500 square feet in total area and used other than as a school or a place of religious worship. In addition, the exemption for construction site office buildings is changed to construction site buildings. The proposed amendments are necessary to incorporate statutory changes made by Senate Bill 443 to §§1202.001 and 1202.003 of the Texas Occupations Code.

The proposed amendments to §70.50 require an industrialized builder in subsection (b) to report to the department when a builder sells or transfers a unit to another registered person and add new subsection (e) that requires a manufacturer to report on its monthly report the disposition of units previously reported as shipped. The proposed amendments are necessary to clarify that transfers to another person include sales and to assure that manufacturers report the disposition of repossessed units.

The proposed amendments to §70.60 restate the purpose of a certification inspection, break subsection (a) into 2 subsections (a) and (b), re-letter existing subsections (b) and (c), clarify when an inspection is terminated, require both the manufacturer and the third party inspection agency responsible for in-plant inspections to assure that conditions of certification are met, require the addition of conditions of certification to the plant certification report, and require that a non-compliance report be issued when a certification team determines that a manufacturer is not capable of meeting the certification requirements. The proposed amendments are necessary to provide a clearer understanding of the purpose of the certification inspection and the requirements to become certified.

The proposed amendments to §70.70(d) require a manufacturer to provide critical load points for the attachment of an industrialized house or building to the foundation instead of a foundation design and to provide minimum requirements for connection and attachment of all modules and modular components to the foundation system. The proposed amendments are necessary because a manufacturer generally does not have enough information about the installation site to provide a relevant foundation design. New subsection (e) is added to §70.70 requiring foundation system designs by licensed Texas engineers or architects and specifies the minimum information required on the foundation system design. The proposed amendment is necessary to assure compliance of the foundation system with the mandatory building codes, since review of the foundation system design by a design review agency is not required, and to assure that the foundation system design contains all applicable information required for the industrialized builder to properly install the industrialized housing or building. The proposed amendments to existing §70.70(e) will renumber this as subsection (f), remove the requirements for foundation system designs, and add the requirement that unique on-site details shall comply with the mandatory building codes. The proposed amendment is necessary since foundation requirements were added to new subsection (e) and to clarify that construction on-site must also comply with the mandatory building codes.

The proposed amendment to §70.73(a) requires that industrialized housing and buildings sited within a municipality comply with the foundation system design and any unique on-site details instead of to any unique foundation system or on-site detailed drawings. The proposed amendment is necessary to correlate with the proposed amendments to §70.70.

The proposed amendments to §70.73(b) require industrialized housing and buildings sited outside the jurisdiction of a municipality to comply with the foundation system design and any unique on-site details instead of to any unique foundation system or on-site detailed drawings. New paragraphs (1)-(3) are added to indicate when site inspections are required outside the jurisdiction of a municipality. The proposed amendments are necessary to correlate with the proposed amendments to §70.70 and to incorporate statutory changes made by Senate Bill 443 to §1202.203 of the Texas Occupations Code.

The proposed amendment to §70.75(a) requires that the manufacturer provide the builder or installation permit holder a set of approved plans as necessary to complete construction of the house or buildings and that the approved plans shall include critical load points for attachment of the house or building to the foundation. The proposed amendments are necessary to correlate with the proposed amendments to §70.70 and to clarify the requirements for documentation provided to the industrialized builder or installation permit holder. The proposed amendments to §70.75(b) require the industrialized builder to provide certain documentation to either the purchaser or installation permit holder including a copy of the foundation system design and any unique on-site details. The proposed amendments are necessary to correlate with the proposed amendments to §70.70 and to assure that installation permit holders are also provided with necessary documentation.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendment is in effect there will be no significant costs and no significant effect on revenue to state government. There will be no costs or effect on revenue to local government as a result of these rule amendments.

Mr. Kuntz also has determined that for each year of the first five-year period the new rules are in effect, the public benefit will be clearer requirements governing industrialized housing and buildings, which will promote public safety.

Mr. Kuntz also has determined that for each year of the first five-year period the new rules are in effect, there will be no significant economic costs to persons who are required to comply with the amended rules, including small and micro-businesses.

Comments on the proposal may be submitted to William H. Kuntz, Jr., Executive Director, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-2872, or electronically: whkuntz@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapters 1202 and 51, which authorize the Department to adopt rules as necessary to implement these chapters.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 1202 and 51. No other statutes, articles, or codes are affected by the proposal.

§70.10. Definitions.

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (6) (No change.)

(7) Commercial structure--An industrialized building classified by the mandatory building codes for occupancy and use groups other than residential for one or more families. [~~The term shall not include a structure that is not installed on a permanent foundation and either is not open to the public or is less than 1,500 square feet in total area and not used as a school or place of religious worship.~~]

(8) - (14) (No change.)

(15) Industrialized builder--A person who is engaged in the assembly, connection, and on-site construction and erection of modules or modular components at the building site or who is engaged in the purchase of industrialized housing or buildings or of modules or modular components from a manufacturer or from another industrialized builder for sale or lease to the public; a subcontractor of an industrialized builder is not a builder for purposes of this chapter.

(16) - (40) (No change.)

(b) - (c) (No change.)

§70.20. Registration of Manufacturers and Industrialized Builders.

Manufacturers and industrialized builders shall not engage in any business activity relating to the construction or location of industrialized housing or buildings without being registered with the department.

(1) - (4) (No change.)

(5) A registered manufacturer or industrialized builder shall notify the department in writing within 10 days if:

(A) - (F) (No change.)

(G) an industrialized builder transfers or sells a module or modular component to another industrialized builder.

(H) an industrialized manufacturer takes possession of units previously reported as shipped to an industrialized builder.

(6) (No change.)

§70.30. Exemptions.

(a) The scope of this chapter is limited by Chapter 1202; accordingly, it does not apply to:

(1) mobile homes or HUD-code manufactured homes as defined in Texas Occupations code, Chapter 1201;

(2) housing constructed of sectional or panelized systems not utilizing modular components;

(3) ready-built homes which are constructed so that the entire living area is contained in a single unit or section at a temporary location for the purpose of selling it and moving it to another location, provided that modular components are not used in the construction of the ready-built home;

(4) any residential or commercial structure which is in excess of three stories or 49 feet in height as measured from the finished grade elevation at the entrance of the structure to the peak of the roof;

(5) a commercial building or structure that is:

(A) installed in a manner other than on a permanent foundation; and

(B) either:

(i) is not open to the public; or

(ii) is less than 1,500 square feet in total area and used other than as a school or a place of religious worship;

(6) [~~(5)~~] buildings that are specifically referenced in the mandatory building codes as exempt from permits;

(7) [~~(6)~~] construction site [~~office~~] buildings; or

(8) [~~(7)~~] any open construction.

(b) The installation of an industrialized house or a permanent industrialized building that is moved from the first installation site to a new installation site is subject to the permitting and approval requirements of the local authorities.

§70.50. Manufacturer's and Builder's Monthly Reports.

(a) (No change.)

(b) Each industrialized builder shall keep records of all industrialized housing, buildings, modules, and modular components that were sold, leased, or installed. These records shall be kept for a minimum of ten years from the date of successful completion of the final site inspection and shall be made available to the department for review upon request. If the builder is not responsible for the installation, then the records shall be maintained for a period of 5 years from the date of sale or lease and shall be made available to the department upon request. An annual audit of units sold, leased, or installed by the builders shall be conducted by the Department. The audit will identify the modules or modular components by the name and Texas registration number of the manufacturer of each unit and the assigned Texas decal or insignia numbers and the corresponding identification, or serial numbers, as assigned by the manufacturer. The builder shall report, or provide, the following information to the Department for each unit identified in the audit within the timeframe set by the audit.

(1) - (4) (No change.)

(5) If the builder is not responsible for the installation and site work, or if the builder has transferred or sold [~~the ownership of~~] the unit to another person, then the builder shall provide identification of the installation permit number, assigned by the Department, or builder registration number, assigned by the Department, of the person responsible.

(c) - (d) (No change.)

(e) A manufacturer that takes possession of units previously reported as shipped shall report the disposition of those units on the manufacturer's monthly report in accordance with subsection (a) of this section.

§70.60. Responsibilities of the Department--Plant Certification.

(a) Prior to being issued decals or insignia, each manufacturing facility will undergo a certification inspection. The plant certification will be conducted by a department team normally consisting of an engineer and one or more department inspectors or, when designated by the department, third party inspectors. The inspection shall be conducted in accordance with the procedures established by the Texas Industrialized Building Code Council. A certification inspection has two primary purposes: [~~The purpose of the plant certification inspection~~]

(1) to verify that the manufacturer is capable of producing modules or modular components that comply with the law and the rules, mandatory building codes, and approved design package; and

(2) to verify [~~will be to assure~~] that the manufacturer's approved compliance control program will ensure compliance now and in the future. [~~in the manufacturing facility is capable of producing structures in compliance with the approved design package.~~]

(b) The team will become familiar with all aspects of the manufacturer's approved design package. Structures on the production line will be checked to assure that failures to conform located by the inspection team are being located by the plant compliance control program and are being corrected by the plant personnel. The inspection team will work closely with the plant compliance control personnel to assure that the approved design package and compliance control manuals for the facility are clearly understood and [~~are being~~] followed. If deemed necessary by the certification inspection team, a representative of the design review agency must be present during the inspection. [~~The plant certification inspection will terminate when the inspection team has fully evaluated all aspects of the manufacturing facility.~~] At least one module or modular component containing all systems, or a combination of modules or modular components containing all systems, shall be observed during all phases of construction. The team must inspect all modules or modular components in the production line for Texas during the certification. The plant certification inspection will terminate when the inspection team has fully evaluated all aspects of the manufacturing facility.

(c) [~~(b)~~] The certification [~~Following completion of the plant certification inspection, the~~] team will issue a plant certification, or facility evaluation, report to the manufacturer when the department has determined that the manufacturer has met the requirements for certification. A copy of the plant certification report will also be forwarded to the third party inspection agency responsible for in-plant inspections. The manufacturer and third party inspection agency will be responsible for ensuring that all conditions of certification as outlined in the certification report are met. The manufacturer must keep a copy of this report in their permanent records. The [~~plant certification~~] report will contain, at a minimum, the following information:

(1) the name and address of the manufacturer;

(2) the names and titles of personnel performing the certification inspection;

(3) the serial or identification numbers of the modules or modular components inspected;

(4) a list of nonconformances observed on the modules or modular components inspected (with appropriate design package references) and corrective action taken in each case;

(5) a list of deviations from the approved compliance control procedures (with section or manual references) observed during the certification inspection with the corrective action taken in each case;

(6) a list of conditions of certification with which the manufacturer must comply to maintain the certification;

(7) [~~(6)~~] the date of certification;

(8) [~~(7)~~] the following statement: "This report concludes that (name of agency), after evaluating the facility, certifies that (name of factory) of (city) is capable of producing (industrialized housing and buildings or modular components) in accordance with the approved building system and compliance control manuals on file in the manufacturing facility and in compliance with the requirements of the Texas Industrialized Building Code Council"; and

(9) [~~(8)~~] the signature of the inspection team leader.

(d) [~~(c)~~] If the certification team determines that [~~during the certification inspection~~] the manufacturer is [~~judged~~] not capable of meeting the certification requirements or that the manufacturer is unable to complete the certification inspection requirements, then [~~building structures in compliance with the approved design package and compliance control manual,~~] the certification team [~~agency~~] will issue a non-compliance [~~deviation~~] report. The non-compliance [~~deviation~~] report will detail the specific areas in which the manufacturer was found to be deficient and may [~~will~~] make recommendations for improvement.

§70.70. Responsibilities of the Registrants--Manufacturer's Design Package.

(a) - (c) (No change.)

(d) On-site construction specifications or documentation. All work to be performed on the building site shall be specifically identified and distinguished from construction to be performed in the manufacturing facility, e.g., assembly and connection of all modules, modular components, systems, equipment, and appliances and attachment to the foundation system. The work to be performed on-site shall be described in detail in documents (architectural sheets, specifications, instructions, etc.) which shall be made available to the builder for use at the site and provided as required for review and inspection to the agency having local authority. The manufacturer shall provide the design review agency on-site construction documentation which must, at the minimum, contain the following:

(1) critical load points for attachment of the house or building or component to the foundation [~~foundation system designs for all models in accordance with the applicable mandatory building code~~];

(2) details for module to module or modular component assembly and connection;

(3) minimum requirements [~~details~~] for connection and attachment of all modules and modular components to the foundation system;

(4) firestopping and draftstopping details;

(5) details for fire exits, balconies, walkways, and other site-built attachments;

(6) exterior weatherproofing details;

(7) details for thermal, condensation, decay, corrosion, and insect protection;

(8) electrical, mechanical, heating, cooling, and plumbing system completion details;

(9) electrical, mechanical, heating, cooling, and plumbing system test procedures;

(10) fire safety provisions; and

(11) specifications and instructions for cooling equipment, and complete information necessary to calculate sensible heat gain along with information on the sizing of the air distribution system, if applicable, and the R values of insulation in the ceiling, walls, and floors.

(e) Foundation system designs. A licensed professional engineer (or architect for one and two family dwellings or buildings having one story and total floor area of 5,000 square feet or less) shall design and seal the foundation systems for each industrialized house or building. Review by a DRA is not needed or required. A municipality that regulates the on-site construction or installation of industrialized housing or buildings may require and review the foundation system design for compliance with the mandatory building code. Foundation system designs shall comply with the mandatory building code referenced in §70.100 and §70.101 and shall contain complete details for the con-

struction and attachment of the house or building on the foundation, including, but not limited to the following:

(1) address or area for which the foundation is suitable;

(2) minimum load specifications, including wind loads, seismic design loads, soil bearing capacity, and if the foundation is designed for expansive soils;

(3) site preparation details;

(4) material specifications;

(5) requirements for corrosion resistance, protection against decay, and termite resistance;

(6) size, configuration, and depth below grade of all footings, piers, and slabs including, but not limited to, details of concrete reinforcement, spacing of footings and piers, capping of piers, and mortar or concrete fill requirements for piers;

(7) fastening requirements, including, but not limited to, size, spacing, and corrosion resistance;

(8) requirements for surface drainage; and

(9) details for enclosure of the crawl space, including details for ventilation and access.

(f) [~~(e)~~] Unique on-site details. If [~~the typical foundation drawing in the on-site construction documentation is not suitable for a specific site, or if the structure is only partially constructed of modular components, or if~~] the industrialized builder will add unique on-site details, or if the details provided by the manufacturer for completing a house or building on site are incomplete or not suitable for the installation site, then a licensed Texas professional engineer (or architect for one and two family dwellings or buildings having one story and total floor area of 5,000 square feet or less) shall design and seal the unique [~~stamp the unique foundation drawings or~~] on-site details and review by a DRA is not needed or required. Unique on-site details shall comply with the mandatory building code referenced in §70.100 and §70.101. A municipality that regulates the on-site construction or installation of industrialized housing or buildings may require and review the unique on-site details for compliance with the mandatory building code.

(g) [~~(f)~~] Non-site specific buildings. Whenever the manufacturer does not know, at the time of construction, where the building is to be placed, in lieu of providing the site specific construction details or typical site construction details as required in subsection (d) of this section, the manufacturer may provide special conditions and/or limitations on the placement of the building. These special conditions and/or limitations will serve to alert the local building official of items, such as handicapped accessibility and placement of the building on the property, which the local building official may need to verify for conformance to the mandatory building codes. Certain site-related details, such as module to module connections, must still be provided by the manufacturer. It is the responsibility of the DRA to verify that such site-related details are included in the manufacturer's approved design package.

§70.73. Responsibilities of the Registrants--Building Site Inspections.

(a) When the building site is within a municipality that has a building inspection agency or department, the local building official will inspect all on-site construction done at the site and the attachment of the structure to the permanent foundation to assure completion and attachment in accordance with the design package, the on-site construction documentation, the foundation system design, and any unique [~~foundation system or~~] on-site details. [~~detailed drawings.~~]

(b) When the building site is outside a municipality, or within a municipality that has no building department or agency, a third party inspector will perform the required inspections in accordance with this section and the inspection procedures established by the Texas Industrialized Building Code Council to assure completion and attachment in accordance with the design package, the on-site construction documentation, the foundation system design, and any unique on-site details. The on-site inspection is normally accomplished in three phases: foundation inspection, set inspection, and final inspection. The final inspection shall be completed within 180 days of the start of construction. The department may grant an extension upon receipt of a written request that demonstrates a justifiable cause.

(1) Site inspections are required for the first installation of all industrialized housing and permanent industrialized buildings installed outside the jurisdiction of a municipality. Exception: Site inspections are not required for the installation[~~, on permanent foundations,~~] of unoccupied industrialized buildings not open to the public, [~~with a gross area of less than or equal to 400 square feet,~~] such as communication equipment shelters, that are not also classified as a hazardous occupancy by the mandatory building code.

(2) Site inspections are required for industrialized buildings that are designed to be moved from one commercial site to another commercial site and that are installed outside the jurisdiction of a municipality if the buildings are used as a school or place of religious worship.

(3) The builder, or installation permit holder, is responsible for scheduling each phase of the inspection with the third party inspector. Additional inspections will be scheduled as required for larger structures and to correct discrepancies. The industrialized builder, or installation permit holder, may utilize a different third party inspector for different projects, but may not change the inspector for a project once started without the written approval of the department. The inspector shall provide the builder or permit holder a copy of the site inspection report, shall keep a copy for a minimum of five years from the date of successful completion of the final inspection, and make a copy of the inspection report available to the department upon request. The report shall be on the form and in the format required by the department and the Texas Industrialized Building Code Council.

(c) - (e) (No change.)

§70.75. Responsibilities of the Registrants--Permit/Owner Information.

(a) The manufacturer shall provide the industrialized builder, or a person who has obtained an installation permit in accordance with §70.20, with the following information:

(1) the name, Texas registration number, and address of the manufacturer of the building;

(2) the location of the decal(s) or insignia on the modules or modular components;

(3) a description of the location of the data plate and explanation of the information thereon;

(4) a set of approved plans, in accordance with §70.70, as necessary to obtain a building permit and as necessary to complete construction of the house or building at the installation site. The documents shall include critical load points for attachment of the house or building to the foundation;

(5) the floor plan of the building and schematic drawings of the plumbing, electrical, and heating/ventilation systems for the owner of the building;

(6) a completed signed copy of the energy compliance checklist (reference subsection (c)(8)(C) of §70.70; and

(7) the information required by §70.78(b).

(b) The industrialized builder shall provide the purchaser (owner) or installation permit holder of any industrialized house or building the following information:

(1) the name, Texas registration number, and address of the manufacturer and industrialized builder;

(2) a description of the location of the data plate and explanation of the information thereon;

(3) the floor plan of the building and schematic drawings of the plumbing, electrical, and heating/ventilation systems;

(4) a complete set of approved plans and specifications in accordance with §70.70, including all records pertinent to alterations of the house or building in accordance with §70.74;

(5) a copy of the foundation system design and any unique on-site details in accordance with §70.70;

(6) [~~(5)~~] the location of the decal(s) or insignia on the module or modular components;

(7) [~~(6)~~] a site plan showing the on-site location of all utilities and utility taps;

(8) [~~(7)~~] a completed signed copy of the energy compliance checklist (reference subsection (a)(6) of this section); and

(9) [~~(8)~~] the information required by §70.78(b).

(c) The manufacturer must have written proof that the information in subsection (a) of this section was delivered to the industrialized builder or installation permit holder and keep this proof in the manufacturer's files for a minimum of five years.

(d) The builder must have written proof that the information in subsection (b) of this section was delivered to the purchaser (owner) or installation permit holder and keep this proof in the industrialized builder's files for a minimum of five years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 23, 2005.

TRD-200506098
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 463-6208

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TITLE 22. EXAMINING BOARDS

PART 18. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

CHAPTER 371. EXAMINATIONS

22 TAC §§371.1 - 371.8, 371.11 - 371.17

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§371.1 - 371.8 and §§371.11 - 371.17, concerning Examinations. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill

402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§371.1. Definitions.

§371.2. Applicant for License.

§371.3. Qualifications for Licensure.

§371.4. Qualifications of Candidates.

§371.5. Approved Colleges of Podiatric Medicine in the United States.

§371.6. Administration of Examination.

§371.7. Development of Examinations.

§371.8. Exam Development Committee.

§371.11. Scoring.

§371.12. Independent Testing Consultant.

§371.13. Examination Disqualification.

§371.14. Licensing of Guaranteed Student Loan Defaulters.

§371.15. Re-examination.

§371.16. Review of Examination.

§371.17. Residency Program Responsibilities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505978
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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CHAPTER 371. EXAMINATIONS AND LICENSURE

22 TAC §§371.1, 371.3, 371.5, 371.7, 371.9. 371.11, 371.13, 371.15, 371.17, 371.19, 371.21, 371.23, 371.25

The Texas State Board of Podiatric Medical Examiners proposes new §§371.1, 371.3, 371.5, 371.7, 371.9. 371.11, 371.13, 371.15, 371.17, 371.19, 371.21, 371.23 and 371.25, concerning Examinations and Licensure. The new sections are being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year of the first five years the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Makan has also determined that for each year for the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, the provisions related to Fees were moved from Chapter 379 to Chapter 371. The new format collapses fee amounts in one chapter related to all costs for Examinations and Licensure. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The new sections are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the laws regulating the practice of podiatry.

The proposed new sections implement the reorganization of current Chapter 379 to be merged with revised Chapter 371. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. Provisions related to the Licensing of Guaranteed Student Loan Defaulters implement Texas Occupations Code, Chapter 56 and Texas Education Code, Chapter 57.

§371.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) *Act*--The Podiatric Medical Practice Act of Texas, Texas Occupations Code, §202.001, et seq.

(2) *Applicant*--A person who applies to the Texas State Board of Podiatric Medical Examiners for a license to practice podiatric medicine in the State of Texas. A person who applies for re-licensing, or applies for renewal of his or her license, or applies for reinstatement of his or her license after suspension or revocation is not an applicant for purpose of this chapter, and subsequent chapters.

(3) *Board*--The Texas State Board of Podiatric Medical Examiners as established and authorized by the Podiatric Medical Practice Act of Texas, Texas Occupations Code, §202.001, et seq.

(4) *Board Member*--A person lawfully appointed by the governor to serve a term as set by law on the board.

(5) *Candidate/Examinee*--A person who has been admitted to take the examination given by or at the direction of the Texas State Board of Podiatric Medical Examiners as a requirement for licensing to practice podiatric medicine in the State of Texas.

(6) *Executive Director*--An employee of the Board who manages the day-to-day operations of the Board and to whose authority the Board may grant the approval of certain temporary/provisional licenses.

(7) *GPME*--Accredited graduate podiatric medical education. For the purposes of these rules, GPME means residency training program.

(8) *President*--The president of the State Board of Podiatric Medical Examiners.

(9) *Secretary*--The secretary of the State Board of Podiatric Medical Examiners.

§371.3. Fees.

(a) The fees set by the Board and collected by the Board must be sufficient to meet the expenses of administering the Podiatric Medical Practice Act, subsequent amendments, and the applicable rules and regulations.

(b) Fees are as follows:

(1) Examination--$250 plus $39 fee for HB660 (criminal history record information)

(2) Re-Examination--$250 plus $39 fee for HB660 (criminal history record information)

(3) Temporary License--$125

(4) Extended Temporary License--$50

(5) Temporary Faculty License--$40

(6) Provisional License--$125

(7) Initial Licensing Fee--$439 plus $5 fee for HB2985

(8) Annual Renewal--$439 plus $1 fee for HB2985

(9) Renewal Penalty--as specified in Texas Occupations Code, §202.301(d).

(10) Non certified podiatric technician registration--$35

(11) Non certified podiatric technician renewal--$35

(12) H.B.O. Certificate--$25

(13) Nitrous Oxide Registration--$25

(14) Duplicate License--$50.

(15) Copies of Public Records--The charges to any person requesting copies of any public record of the Board will be the charge established by the Texas Building and Procurement Commission. The Board may reduce or waive these charges at the discretion of the Executive Director if there is a public benefit.

(16) Statute and Rule Notebook--provided at cost to the agency.

(17) Duplicate Certificate--$10.

(18) HB660 (criminal history record information)--$39.

§371.5. Applicant for License.

(a) Any person who wishes to practice podiatric medicine in this state, who is not otherwise licensed under law, must successfully pass an examination given at the Board's direction pursuant to §371.15 of this title (relating to Administration and Scoring of Examination), and complete the graduate podiatric medical education requirements as set forth herein, §371.7(g) of this title (relating to Qualifications for Licensure). One who successfully completes all the requirements for licensing as set forth in these rules and who has made payment of all applicable fees shall be awarded a valid license to practice podiatric medicine in the State of Texas for the term lawfully stipulated by and under the conditions set forth in these Rules, and the Podiatric Medical Practice Act of Texas, Texas Occupations Code, Chapter 202, Subchapter F.

(b) Any person who wishes to set for examination, shall submit a written application on a form provided by the Board. The applicant shall verify by affidavit the information in the application. The Board may refuse to admit to the examination or grant a license to any applicant who knowingly submits false information to the Board.

(c) Applications for examination must be on the Board's application form printed in ink or typewritten, which shall be furnished by the Board staff upon request.

(d) The completed application and required supporting materials must be received by the Board staff no later than 60 days before the first day of the examination. The materials supporting the application, such as transcripts of candidates, shall be received by the Board before the examination.

(e) The filing of an application and tendering the fee to the Board staff shall not in any way obligate the Board to admit the applicant to examination until applicant has been qualified by the Board as meeting the statutory and regulatory requirements for admission to the examination for licensing.

(f) The full examination fee is $289. Only certified check, Postal Service Money Order or Express Money Order shall be accepted. No examination fee will be refunded. The examination fee must be received by the Board at least 15 days before the date the applicant is scheduled to begin the examination.

(g) Temporary License.

(1) A temporary license may be granted by the Board to a certified graduate of an accredited college of podiatric medicine under §371.7(c) of this title (relating to Qualifications for Licensure) who is enrolled in an accredited graduate podiatric medical education (GPME) program under §371.7(g) of this title (relating to Qualifications for Licensure) for a term not to exceed the time the graduate is enrolled in said GPME program. In no case is said temporary license to be issued for a term to exceed three years, or renewed in successive years for a time that cumulatively exceeds three years.

(2) A temporary license may be granted by the Board to a certified graduate of an accredited college of podiatric medicine under §371.7(c) of this title (relating to Qualifications for Licensure) or who is enrolled in a GPME program that is pending accreditation, as defined under §371.7(g) of this title (relating to Qualifications for Licensure) for a term not to exceed the time the graduate is enrolled in said GPME program. In no case is said temporary license to be issued for a term to exceed three years, or renewed in successive years for a time that cumulatively exceeds four years. It shall be the sole responsibility of the applicant to ascertain the accreditation status, as defined in §371.7(g) of this title (relating to Qualifications for Licensure) of the applicant's GPME program.

(3) A temporary licensee granted a temporary license for the purpose of pursuing a GPME program in the State of Texas shall not engage in the practice of podiatric medicine, whether for compensation or free of charge, outside the scope and limits of the GPME program in which he or she is enrolled.

(4) A temporary license granted by the Board for the purpose of pursuing a GPME program in the State of Texas shall terminate by operation of law and under these rules at the time and on the day that said temporary licensee leaves or is terminated from said GPME program. Any successive entry into a second or further GPME program shall be subject to all laws and rules and application requirements set forth herein.

(5) All temporary licensees shall be subject to the same fees and penalties as all other licensees as set forth in the Podiatric Medical Practice Act of Texas, Texas Occupations Code, §202.001 et seq., and subsequent amendments, including §202.153 of said Act, and Chapter 376 of this title (relating to Violations and Penalties), except that temporary licensees are not subject to any Board rules concerning continuing medical education.

(6) Prior to licensure, applicants for a temporary license must have passed both Part I and Part II of the National Board, and shall provide written documentation of passing same directly from the National Board of Podiatric Medical Examiners to the Texas State Board of Podiatric Medical Examiners.

(h) Extended Temporary License.

(1) The Agency's Executive Director may grant the holder of a current "Texas Temporary License" an "Extended Temporary License," for good cause. Good cause may include but is not limited to:

(A) The illness of the holder or a family member for whom the holder is directly or indirectly responsible.

(B) A verifiable family emergency.

(C) An additional residency training issue.

(D) Additional time needed for the results of the Texas Jurisprudence Exam to be disseminated and for a valid regular license to be issued by the Board to the holder.

(2) An Extended Temporary License is an extension of the holder's Temporary License and shall allow the holder to continue to practice podiatric medicine for up to an additional three months, with the same responsibilities, restrictions and conditions of a Temporary License as found in subsection (g) of this section.

(3) The fee for an Extended Temporary License shall be $50 for a three month period.

(4) An Extended Temporary License may be renewed a maximum of two times to any holder of a Temporary License. The second renewal shall be granted only after and upon the agency's Executive Director's determination that appropriate "good cause" circumstances continue to exist for the re-issuance of an Extended Temporary License.

(i) Temporary Faculty License.

(1) The Board may issue a Temporary Faculty License to a qualified podiatric physician who at the time of applying for this license has accepted an appointment to, or is serving as a full-time member of the faculty of an educational institution in this state including a hospital approved podiatric residency program, a residency program pending approval, offering an approved or accredited course of study or training leading to a degree in podiatric medicine.

(2) In this subsection, the term "qualified podiatric physician" shall mean one who:

(A) is a licensed podiatric physician in good standing in another state having similar licensing requirements as that of this Board, and;

(B) has been in podiatric practice in another state.

(3) This Temporary Faculty License shall be issued to the holder in monthly increments not to exceed 24 months. The incremental periods wherein the license is valid need not be contiguous, but rather may be in any arrangement approved by the Executive Director of the Board.

(4) The Temporary Faculty License shall authorize the visiting podiatric physician to practice podiatric medicine only and exclusively within the teaching confines of the educational institution in this state, hospital or approved residency program or a program pending approval by the Council of Podiatric Medical Education of the American Podiatric Medical Association as a part of the duties and responsibilities assigned by the teaching institution to the license holder.

(5) Except for the requirement of passing the Board's Jurisprudence Examination and completing an approved one-year residency program any person applying for a Temporary Faculty License under this section must comply with all application, and licensure requirements found in §371.7 of this title and are subject to the Board's Statute and Rules.

(6) The holder must sign an oath on a notarized form provided by the Board swearing that the holder has read and is familiar with the Board's Statute and Rules; will abide by this Statute and Rules and will be subject to the disciplinary procedures of the Board.

(j) Provisional License.

(1) Requirements for Provisional License. On application for examination, an applicant may apply for a provisional license under the following circumstances.

(A) The applicant must be licensed in good standing as a podiatric physician in another state, the District of Columbia, or a territory of the United States that has licensing requirements that are substantially equivalent to the requirements of the Podiatric Medical Practice Act, subsequent amendments, and rules and must furnish proof of such licensure on Board forms provided.

(B) The applicant must have passed a national or other examination recognized by the Board relating to the practice of podiatric medicine and must submit a true and correct copy of the applicant's score report.

(C) The applicant must not have failed an examination for a license conducted by the Board.

(D) The applicant's license to practice podiatric medicine must not have been revoked or suspended in any jurisdiction.

(2) Sponsorship. An applicant for provisional licensure must be sponsored by a person currently licensed by the Board for at least five years and in good standing under the Podiatric Medical Practice Act with the following conditions applicable.

(A) Prior to practice in Texas, on forms provided by the Board, the sponsor licensee will certify to the Board the following:

(i) that the applicant for provisional licensure will be working within the same office as the licensee, under the direct supervision of the sponsor licensee; and

(ii) that such sponsor licensee is aware of the Act and rules governing provisional licensure and that the sponsorship will cease upon the invalidity of the provisional license.

(B) Sponsor licensee will be held responsible for the unauthorized practice of podiatric medicine should such provisional license expire.

(3) Hardship. An applicant for a provisional license may be excused from the requirement of sponsorship of this rule if the Board determines that compliance with this subsection constitutes a hardship to the applicant.

(4) Application and $125 Fee. The Board shall issue a license pursuant to this rule to the holder of a provisional license if:

(A) The applicant for provisional licensure will be subject to all application requirements required by this chapter and subject to the applicable examination fees established under §371.3(b)(1) of this title (relating to Fees). In addition, the applicant will be subject to a fee for issuance of a provisional license.

(B) No provisional license can be issued until all application forms and fees are received in the Board office and the application is approved.

(C) A provisional license expires upon the passage of 180 days or notice by the Board of the applicant's successful passage or failure of all examinations required by this chapter, whichever comes first. It shall be the responsibility of the applicant and sponsor to return the provisional license to the Board office on expiration.

(D) The applicant's failure to sit for the first scheduled Board examination following application for examination invalidates the provisional license, unless in the discretion of the Executive Director sufficient and reasonable evidence regarding nonappearance exists.

(E) Each applicant for provisional license shall receive only one nonrenewable license prior to the issuance of a license.

(F) If at any time during the provisional licensure period it is determined that the holder of such provisional license has violated the Podiatric Medical Practice Act or Board rules, such provisional license will be subject to disciplinary action including revocation.

§371.7. Qualifications for Licensure.

(a) All applicants shall have attained the age of 21 years.

(b) If the applicant has ever been convicted of a felony or a crime of moral turpitude under the state laws of any state or the federal laws of the United States, the approval for licensure shall be at the discretion of the Board.

(c) Each applicant shall have completed the number of college courses required by the Texas Occupations Code, §202.252(b)(3), and graduated from an accredited college of Podiatric Medicine in the United States. The applicant's entire course of instruction must be from such an approved college, and the college must have been so approved during the entire course of the applicant's course of instruction.

(d) All applicants shall have successfully completed a course in cardiopulmonary resuscitation and provide a current certification to that effect.

(e) All applicant's shall have successfully passed all sections of the National Board and provide their scores directly from the National Board of Podiatric Medical Examiners to the Texas State Board of Podiatric Medical Examiners.

(f) If §371.15(e) of this title (relating to Administration and Scoring of Examination) applies, the applicant must meet the overall minimum cut score for the jurisprudence exam. Each applicant shall cause the applicant's test scores from such exam to be sent directly from the testing entity to the Board.

(g) Every applicant shall have completed at least one year of GPME with a hospital, clinic or institution acceptable to the Board in a GPME program approved by the Council of Podiatric Medical Education of the American Podiatric Medical Association. Certified documentation of enrollment in said GPME program must accompany the application to the Board for licensing. This subsection, became effective at 12:01 a.m., July 1, 1995.

(h) The Board approves and adopts by reference the Standards and Requirements for Approval of Residencies in Podiatric Medicine and Surgery and Procedures for Approval of Residencies in Podiatric Medicine and Surgery adopted by the Council on Graduate Podiatric Medical Education of the American Podiatric Medical Association. The standards are available from the Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216. The Board considers any college of podiatric medicine accredited by the Council on Podiatric Medical Education of the American Podiatric Medical Association as a college approved by the Board.

(i) The applicant shall submit evidence sufficient for the Board to determine that the applicant has met all the requirements of this section and any other information reasonably required by the Board. Any application, diploma or certification, or other document required to be submitted to the Board that is not in the English language must be accompanied by a certified translation thereof into English.

(j) At the discretion of the Board, the GPME requirement set forth in subsection (g) of this section may be waived if the applicant has been in active podiatric practice for at least five continuous years in another state under license of that state, and upon application to the Board can show an acceptable record from that state and from all other states under which the applicant has ever been licensed.

(1) A showing of an acceptable record under this subsection is defined to include, but is not limited to, a showing that the applicant has not had entered against him a judgment, civil or criminal, in state or federal court or other judicial forum, on a podiatric medical-related cause of action, no conviction of a felony or a crime of moral turpitude, no disciplinary action recorded from any medical institution or agency or organization, including, but not limited to, any licensing board, hospital, surgery center, clinic, professional organization, governmental health organization or extended-care facility, and no dishonorable discharge from military service.

(2) If any judgment or disciplinary determination under this subsection, has been on appeal, reversed, reversed and rendered, or remanded and later dismissed, or in any other way concluded in favor of the applicant, it shall be the applicant's responsibility to bring such result to the notice of the Board by way of certified letter along with any such explanation of the circumstances as the applicant deems pertinent to the Board's determination of admittance to licensure in the State of Texas.

(3) The applicant shall obtain and submit to the Board a letter from any and all state boards under which he or she has ever been previously licensed stating that the applicant is a licensee in good standing with each said board or that said prior license or licenses were terminated or expired with the licensee in good standing.

§371.9. Qualifications of Candidates.

A candidate, to be eligible to take the examination given by the Board, must not only meet the requirements of §371.7 of this title (relating to Qualifications for Licensure) but must also be prepared to demonstrate to the Board that such candidate is not disqualified from taking the examination for any of the reasons set forth in Texas Occupations Code, §202.253(a)(1) - (18).

§371.11. Approved Colleges of Podiatric Medicine in the United States.

The Board approves and adopts by reference the Standards and Requirements for Accrediting Colleges of Podiatric Medicine and Procedures for Accrediting Colleges of Podiatric Medicine adopted by

the Council on Podiatric Medical Education of the American Podiatric Medical Association. The standards are available from the Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216. The Board considers any college of podiatric medicine accredited by the Council on Podiatric Medical Education of the American Podiatric Medical Association as a college approved by the Board.

§371.13. Developing Exams.

(a) The Board is empowered to establish standards that candidates must meet. Such standards are designed to ensure that licensed podiatric physicians possess the appropriate knowledge and skills in sufficient degree to practice podiatric medicine in the State of Texas. One of these standards is the ability to pass a Board-specified examination. The examination is developed by the Board's Exam Development Committee.

(b) The Exam Development Committee members shall consist of podiatric physicians licensed in the State of Texas and an independent testing professional(s) contracted by the Board to validate the exam.

(c) The Board shall establish the qualifications for membership to the Exam Development Committee.

(d) The Exam Development Committee shall construct examinations from the committee's test specifications which reflects knowledge of the boards laws and rules which govern the practice of podiatric medicine in Texas.

§371.15. Administration and Scoring of Examination.

(a) To be eligible for licensure an applicant must sit for and pass the Texas Podiatric Medical Jurisprudence Examination administered by the board. The board shall administer the Texas Podiatric Medical Jurisprudence Examination at times and places as designated by the board.

(b) All candidates shall be provided a candidates handbook that shall explain detailed information about the examination process prior to exam administration.

(c) Candidates shall not be permitted to bring any help into the examination room, or to communicate by word or sign with another examinee while an examination is in progress without permission of the presiding examiner and within the hearing of a designated representative of the Board; nor shall the examinee leave the examination room except when permitted by the presiding examiners and accompanied by a member or an employee of the Board.

(d) A license shall not be issued to any person who has been detected in a deceptive, dishonest or fraudulent act while taking an examination required by the Board.

(e) At the option and at the complete discretion of the Board, the examination may be conducted, in whole or in part, upon a vote of a majority of the Board, by any school, institute, or organization that is deemed by the same majority of the Board to provide adequate and fair examinations of sufficient high standards as to continue to insure high quality practitioners in the State of Texas. The manner of examination, the time of examination and the scheduling of the examination, as well as fee requirements and grading operations may then be delegated by the Board to such an entity, provided, however, that examination results, grades and copies of the examination are made available to the Board and are sent directly from the delegated entity to the Board, and the Board is to maintain a record of the examination results.

(f) The passing score for the examination shall be determined by the Board using accepted criterion-referenced methods.

(g) The Board shall have the examination validated by an independent testing professional.

§371.17. Examination Disqualification.

(a) Applicants who wish to take the examination but who may be disqualified for reasons set out in Texas Occupations Code, §202.253, shall be entitled to a hearing before the Board or a subcommittee of the Board, but such hearing may be informal and need not be held in accordance with Chapter 377 of this title (relating to Procedure Governing Grievances, Hearings, and Appeals).

(b) Hearings on whether an applicant is qualified to take the examination shall be held as soon as possible after the Board receives the application.

(c) If the hearing is held immediately preceding the examination, the Board shall determine whether the applicant is qualified to take the examination before the examination begins. However, if the hearing is not completed by the time the examination is scheduled to begin, the Board may recess such hearing, and any applicant who has not had a hearing shall be allowed to take the examination. The examination grades of all such applicants shall not be disclosed to those applicants until after their eligibility to take the examination is finally determined.

(d) Any applicant who is refused admittance to an examination has the right to appeal such decision in accordance with §376.35 of this title (relating to Judicial Review), Texas Occupations Code, §202.258, and Government Code, §2001.001 et seq.

§371.19. Licensing of Guaranteed Student Loan Defaulters.

(a) The Board shall refuse to renew the license of a licensee whose name is in the list of those who have defaulted on student loans published by the Texas Guaranteed Student Loan Corporation (hereinafter TGSLC) unless:

(1) the renewal is the first renewal following the Board's receipt of a TGSLC list including the licensee's name among those in default; or

(2) the licensee presents to the Board a certificate issued by the TGSLC certifying that;

(A) the licensee has entered into a repayment agreement on the defaulted loan; or

(B) the licensee is not in default on a loan guaranteed by the corporation.

(b) The Board may issue an initial license to a person on TGSLC's list of defaulters who meets all other qualifications for licensure but shall not renew the license unless the licensee presents to the Board a certificate issued by the TGSLC certifying that;

(1) the licensee has entered into a repayment agreement on the defaulted loan; or

(2) the licensee is not in default on a loan guaranteed by the TGSLC.

(c) The Board shall not renew the license of a licensee who defaults on a repayment agreement unless the person presents to the Board a certificate issued by the TGSLC certifying that;

(1) the licensee has entered into another repayment agreement on the defaulted loan; or

(2) the licensee is not in default on a loan guaranteed by the TGSLC or on a repayment agreement.

(d) The Board will provide the licensee identified by the TGSLC as being in default with written notice of his or her default status at least 30 days before the expiration day of the license to the last known address according to the Board's record.

(e) A person informed by the Board of his or her default status according to the TGSLC shall be given a hearing in accordance with Chapter 377 et seq.

§371.21. Re-Examination.

(a) All failing candidate will be permitted to be re-examined at a future Board examination date. Repeating candidates must meet the same qualifications as first-time candidates.

(b) The examination for repeating candidates shall be the same as, or equivalent to, the examination for first-time candidates.

(c) Repeating candidates are required to pay the regular examination fee for all subsequent re-examination.

(d) Three unsuccessful attempts by an applicant to pass the examination bars such applicant from all future examinations provided, however, they have the option of appealing it to the Board. The Board has sole discretion to authorize any training they deem necessary or appropriate before retaking the examination.

§371.23. Review of Examination.

(a) If requested in writing by a person who fails the licensing examination developed and administered by the Board, the person may review their performance on the examination.

(b) The following protocol must be observed for candidate review:

(1) only failing candidates may review examinations;

(2) only one review of a given examination is permitted;

(3) the review will be done at the convenience of the Board;

(4) the review request must be received NOT MORE THAN 30 days after release of the examination results;

(5) the review must be scheduled to occur no later than 30 days before the next administration of the examination;

(6) the materials to be provided are the candidate's original test sheets used in the examination;

(7) any copies or notes made by the candidate during the review will be kept by the Board.

§371.25. Residency Program Responsibilities.

(a) All residency programs requesting temporary licenses for the podiatric physicians participating in the program must meet all American Podiatric Medical Association/Council on Podiatric Medical Education (APMA/CPME) requirements for accreditation.

(b) The residency director will be held responsible for the entire program including but not limited to:

(1) ensuring that the temporary licensee is practicing within the scope of the residency program requirements;

(2) ensuring that the temporary licensee has read and understood the Act and Rules governing the practice of podiatric medicine; and

(3) ensuring that all residency program attendees are properly licensed with the Board prior to participation in the program.

(c) Within thirty (30) days of the start date of the program each year, the residency director must report to the Board a list of all residents enrolled in the program, the names of all of the directors in the program and which program each individual is enrolled in.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505989
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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CHAPTER 373. IDENTIFICATION OF PRACTICE

22 TAC §§373.1 - 373.7

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§373.1 - 373.7, concerning Identification of Practice. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric

Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§373.1. Definitions.
§373.2. Practitioner Identification.
§373.3. Notify Board of Practice Name.
§373.4. Trade Names and Assumed Names.
§373.5. Professional Corporations or Professional Associations.
§373.6. Associations with Practitioners of Other Branches of the Healing Art.
§373.7. Violations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Janie Alonzo
Staff Services Officer V
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CHAPTER 373. ADVERTISING AND PRACTICE IDENTIFICATION

22 TAC §§373.1, 373.3, 373.5, 373.7, 373.9, 373.11, 373.13, 373.15

The Texas State Board of Podiatric Medical Examiners proposes new §§373.1, 373.3, 373.5, 373.7, 373.9, 373.11, 373.13 and 373.15, concerning Advertising and Practice Identification. The new sections are being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. Section 373.13 seeks to clarify the limitations of proper advertising to prevent misleading the public into what insurance payment provisions are required of both the podiatric physician and the prospective patient. For example, patients are required to make co-payments and that insurance requirement cannot be waived by the podiatric physician to solicit patient business. Furthermore, §373.13 also clarifies that podiatric physicians can only advertise board certifications that are approved by the Council on Podiatric Medical Education or the American Podiatric Medical Association. Due to the ability of any person to obtain questionable credentials in this age of mass communication via the internet, the purpose of this provision is to ensure that the public is not deceived by exaggerated credentials not recognized by formal standards of education and training.

Hemant Makan, Executive Director, has determined that for each year of the first five years the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Makan has also determined that for each year for the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373 relating to Advertising and Practice Identification. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The new sections are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the laws regulating the practice of podiatry.

The proposed new sections implement the reorganization of current Chapter 375 to be merged with revised Chapter 373. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§373.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) *Board*--The Texas State Board of Podiatric Medical Examiners as established and authorized by the Podiatric Medical Practice Act of Texas, Texas Occupations Code, §202.001, et seq.

(2) *Practitioner*--A person validly licensed by the Texas State Board of Podiatric Medical Examiners to practice podiatric medicine in the State of Texas for a term set by law.

(3) *Publication*--Any and all public communications relating to the podiatric physician's practice, including but not limited to, advertisements, announcements, invitations, press releases, journal articles, periodical articles, leaflets, news stories, materials distributed by

private or by United States mail, and signs or placards placed in public view or electronic submission (i.e. internet).

§373.3. Practitioner Identification.

(a) A licensed practitioner or podiatric medicine shall always in any publication that includes his name use only the authorized designation to professionally identify himself or herself. Authorized designations for a podiatric physician are limited to the following: Doctor of Podiatric Medicine, D.P.M., Podiatrist, Podiatric Physician.

(b) A practitioner shall always in any publication that includes the name of his practice use an authorized designation to professionally identify his practice. Authorized designations for a podiatric physicians practice are limited to the following: Foot Surgeon, Podiatric Surgeon, Foot Specialist, Doctor and Surgeon of the Foot, Injuries and Diseases of the Foot, Podiatric Physician.

(c) The purpose of this subsection and of so limiting the professional designations of a podiatric physician and his/her practice's business is to insure that the public and all prospective patients are reasonably informed of the distinction between podiatric physicians and other medical practitioners as is reflected by the difference in training and licensing and the scope of practice.

(d) If a practitioner creates a professional corporation or other entity to conduct his practice, he shall, to identify his practice, use an authorized designation followed by one of the suffixes listed in §373.9 of this title (relating to Professional Corporations or Professional Associations). Examples: John Doe, D.P.M., a Prof. Corp.; Dr. John Doe, Podiatrist, Inc; John Doe, D.P.M., P.A; John Doe, D.P.M., P.L.L.P.

(e) A practitioner shall not use a trade name or assumed name to identify his practice, except as authorized in §373.7 of this title (relating to Corporate Trade Names and Assumed Names).

§373.5. Notify Board of Practice Name.

The Board shall be notified immediately of each such designation of name and address at which each practitioner practices and shall be notified of such authorized designations at each license renewal application identifying the name and degree of the practitioner.

§373.7. Corporate Trade Names and Assumed Names.

(a) A podiatric physician shall submit to the Board a corporate name, trade name or assumed name to identify an individual practice, a group of podiatric physicians with which he/she is practicing for review and approval.

(b) The Board shall approve a trade name or assumed name that:

(1) includes a word or words indicating the practice specialty is podiatric medicine;

(2) fairly and objectively identifies the practice; and

(3) complies with §373.13 of this title (relating to Advertising).

(c) If a name is disapproved, the Board shall notify in writing the party requesting the ruling on the name and set forth the reasons for disapproval.

(d) Within any advertisement or like publication that includes the name of a group, each podiatric physician in the group shall also publish his own name and professionally identify himself in the manner provided in §373.3(a) or (b) of this title (relating to Practitioner Identification), as applicable.

(e) Any person who violates any provisions of this section, or a determination of the Board hereunder, is subject to penalty pursuant to Chapter 376 of this title (relating to Violations and Penalties) of up to $500 for each day of violation, as provided in Texas Occupations Code §202.352, not to exceed the maximum penalty amount set forth in Chapter 376 of this title herein.

§373.9. Professional Corporations or Professional Associations.

The name of a professional corporation created for the practice of podiatric medicine shall include one of the following suffices:

(1) (Name), A Professional Corporation

(2) (Name), A Prof. Corp.

(3) (Name), P.C.

(4) (Name), Incorporated.

(5) (Name), Inc.

(6) (Name), Professional Association

(7) (Name), P.A.

(8) (Name), P.L.L.P.

(9) (Name), Professional Limited Liability Partnership

(10) (Name), P.L.L.C.

(11) (Name), Professional Limited Liability Company

(12) (Name), L.L.C.

(13) (Name), Limited Liability Company

§373.11. Associations with Practitioners of Other Branches of the Healing Art.

A podiatric physician practicing in a group composed of practitioners from different branches of the healing arts may practice under a corporate name, trade name or assumed name adopted by the group, provided the name is first submitted to and approved by the Board in accordance with the standards specified in §373.7(b)(2) and (3) of this title (relating to Corporate Trade Names and Assumed Names). In addition, within the group, the podiatric physician shall identify himself in the manner provided in §373.3(a) or (b) of this title (relating to Practitioner Identification), as applicable.

§373.13. Advertising.

(a) A podiatric physician may advertise. A podiatric physician shall not, however, use or participate in the use of any publication, including advertisements, news stories, press releases, and periodical articles, that contains a false, fraudulent, misleading, deceptive, scientifically unsupported or generally unaccepted, or unfair statement or claim, or that are exaggerations or are untrue.

(b) A false, fraudulent, misleading, deceptive, scientifically unsupported or generally unaccepted, or unfair statement or claim includes but is not limited to, a statement or claim that:

(1) contains a misrepresentation of fact, or claims as fact something that has not been generally accepted among the podiatric community or by the Board as having been proven or established as fact;

(2) is likely to mislead or deceive or entice or persuade a reasonable person because it fails to make full disclosure of relevant facts whether regarding fees, modes of treatment, conditions or techniques of surgery, post-operative conditions such as degree of pain, length of time of recovery, mobility and strength during recovery, and the like;

(3) is intended or likely to create in an ordinary reasonable person false or unjustified expectations of favorable results;

(4) states or implies educational or professional attainments or licensing recognition not supported in fact;

(5) states or implies that the podiatric physician has received formal recognition as a specialist, or has any specialized expertise if this is not the case;

(6) contains any laudatory statement, or other statement or implication that the podiatric physician's services are of exceptional quality;

(7) contains statistical data or information that reflects or is intended to reflect quality or degree of success of past performance, or prediction of future success;

(8) represents that podiatric services can or will be completely performed for a stated fee amount when this is not the case, or makes representations with respect to fees that do not disclose all variables affecting the fees, or makes representations that might reasonable cause an ordinary prudent person to misunderstand or be deceived about the fee amount;

(9) contains a testimonial;

(10) represents that health care insurance deductibles or co-payments may be waived or are not applicable to health care services to be provided if the deductibles or co-payments are required;

(11) represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or co-payments are required.

(c) Information contained in a public communication by a podiatric physician may include, but is not limited to the following:

(1) name, address, telephone numbers, office hours, and telephone-answering hours;

(2) biographical and educational background;

(3) professional memberships and attainments and certifications, subject, however, to the provisions of subsection (e) of this section;

(4) description of services offered, subject, however to the provisions of subsection (f) of this section;

(5) foreign language ability;

(6) acceptable credit arrangements, subject, however, to the provisions of subsection (b)(2) and (8) of this section;

(7) the limitation of practice to certain areas of podiatric medicine;

(8) the opening or change in location of any office and change in personnel;

(9) fees charged for the initial consultation, provided that if the time for the consultation is to be limited, any such limitation on the time shall be stated;

(10) fixed fees for specific podiatric treatments and services, subject, however, to the provisions of subsection (b)(2) and (8) of this section; and

(11) a statement that a schedule of fees or an estimate of fees to be charged for specific treatments or services will be available on request.

(d) All podiatric physicians shall retain recordings, transcripts, or copies of all public communications by date of publication for a period of at least two years after such communication was made.

(e) A podiatric physician may advertise or publish the name of any board of certification under which the podiatric physician has fully and validly become certified provided, however, that:

(1) The full name of the certifying board is included in the publication; that is, no advertisement or publication may include the bare phrase "board certified", or the like;

(2) It shall be the duty of each podiatric physician to determine before publication of any such advertisement or public communication whether the certifying board he wished to advertise is in fact approved or recognized by the Council on Podiatric Medical Education of the American podiatric Medical Association. Podiatric physicians may not list in any type of advertisement or public communication any certifying board that is not approved or recognized by the Council on Podiatric Medical Education or the American Podiatric Medical Association.

(f) If a publication by or for a podiatric physician includes mention of a particular surgical technique or device, such as laser surgery, minimal incision surgery, laser bunion surgery or similar particular techniques or devices, the publication must also include a specific and true statement that reveals to an ordinary reasonable person the limits and scope and specific purpose of the technique so as not to mislead an ordinary reasonable person regarding the difficulty, pain or discomfort, length of time for surgery or recuperation, or possibility of complications.

(g) Within the advertisement section of any published or publicly distributed telephone directory, where the profession of podiatric medicine is a plainly visible rubric under which only licensed podiatric physicians appear in print, the rubric itself shall suffice to identify the practice of the licensee as a podiatric physician where the listing is an in-column advertisement; where the advertisement is a block advertisement, even if it falls under such a plain title §371.3 of this title (relating to Practitioner Identification) and §373.7 of this title (relating to Corporate Trade Names and Assumed Names) herein. It shall be the sole responsibility of the licensee to insure that advertisements and listings published in any telephone directory are accurate and conform to the rules set forth by the Board.

§373.15. Violations.

(a) Any person who violates this chapter et seq., or a determination of the Board hereunder is subject to a administrative penalty of up to $500 for each day of violation.

(b) In addition, failure of a podiatric physician licensed by the Board to identify his practice consistent with this chapter is subject to the penalties provided by Chapter 376 of this title (relating to Violations and Penalties).

(c) At the request of the board, the attorney general shall institute and conduct the action in the name of the state.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
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CHAPTER 375. RULES GOVERNING CONDUCT

22 TAC §§375.1 - 375.6, 375.8 - 375.16

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§375.1 - 375.6 and §§375.8 - 375.16, concerning Rules Governing Conduct. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§375.1. Definitions.
§375.2. General.
§375.3. Advertising.
§375.4. Consumer Information.
§375.5. Offices.
§375.6. Public Participation in Meetings.
§375.8. Relationships with Other Practitioners.
§375.9. Identity of Surgeon.
§375.10. Fees.
§375.11. Records.
§375.12. Reporting Medical Professional Liability Claims.
§375.13. Severability.
§375.14. Report Change of Practice Address and/or Phone Number to the Board.
§375.15. Compliance with Orders, Subpoenas, and Investigations.
§375.16. General Authority of Podiatrist to Delegate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505980
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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CHAPTER 375. CONDUCT AND SCOPE OF PRACTICE

22 TAC §§375.1, 375.3, 375.5, 375.7, 375.9, 375.11, 375.13, 375.15, 375.17, 375.19, 375.21, 375.23, 375.25, 375.27, 375.29, 375.31, 375.33

The Texas State Board of Podiatric Medical Examiners proposes new §§375.1, 375.3, 375.5, 375.7, 375.9, 375.11, 375.13,

375.15, 375.17, 375.19, 375.21, 375.23, 375.25, 375.27, 375.29, 375.31 and 375.33, concerning Conduct and Scope of Practice. The new rules are being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. Section 375.5 adds the provision for annual renewal of Hyperbaric Oxygen Certification. This section also identifies the scope of this modality by limiting it to the treatment of the foot and ankle as the entire body is submerged in the dive. Section 375.7 adds the provision for annual renewal of Nitrous Oxide/Oxygen Inhalation Conscious Sedation. Section 375.21 adds the cost of x-rays when a patient is requesting copies of their records and finally §375.33 clarifies the level of offenses relating to sexual misconduct that can occur in the setting of a doctor/patient relationship.

Hemant Makan, Executive Director, has determined that for each year of the first five years the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Makan has also determined that for each year for the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373 relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375 relating to Conduct and Scope of Practice. The effect on small businesses, micro-businesses or individuals will be a cost to licensees who are utilizing the procedures. There will be a $25 per year renewal fee for each type of certificate and a $5 late fee if applicable.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The new sections are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the laws regulating the practice of podiatry.

The proposed new sections implement the reorganization of current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. The provisions related to sexual misconduct are responsive, but not limited to Texas Penal Code Title 5 regarding sexual offenses.

§375.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context indicates otherwise:

(1) *Board*--The Texas State Board of Podiatric Medical Examiners.

(2) *Foot*--The foot is the tibia and fibula in their articulation with the talus, and all bones to the toes, inclusive of all soft tissues (muscles, nerves, vascular structures, tendons, ligaments and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus and all bones to the toes.

(3) *Medical Records*--Any records, reports, notes, charts, x-rays, or statements pertaining to the history, diagnosis, evaluation, treatment or prognosis of the patient including copes of medical records of other health care practitioners contained in the records of the podiatric physician to whom a request for release of records has been made.

(4) *Office*--In the singular, includes the plural.

(5) *Public communication*--Any written, printed, visual, or oral statement or other communication made or distributed, or intended for distribution, to a member of the general public or the general public at large.

(6) *Solicitation*--A private communication to a person concerning the performance of a podiatric service for such person.

§375.3. General.

(a) The health and safety of patients shall be the first consideration of the podiatric physician. The principal objective to the podiatric profession is to render service to humanity. A podiatric physician shall continually strive to improve his medical knowledge and skill for the benefit of his patients and colleagues. The podiatric physician shall administer to patients in a professional manner and to the best of his ability. Secrets and personal information entrusted to him shall be held inviolate unless disclosure is necessary to protect the welfare of the individual or the community. A podiatric physician shall be temperate in all things in recognition that his knowledge and skill are essential to public health, welfare, and human life.

(b) A licensed podiatric physician shall conduct his practice on the highest plane of honesty, integrity, and fair dealing and shall not mislead his patients as to the gravity of such patient's podiatric medical needs. A podiatric physician shall not abandon a patient he has undertaken to treat. He may discontinue treatment after reasonable notice has been given to the patient by the podiatric physician of his intention to discontinue treatment and the patient has had a reasonable time to secure the services of another podiatric physician or all podiatric medical services actually begun have been completed and there is no contract or agreement to provide further treatment.

§375.5. Hyperbaric Oxygen Guidelines.

A podiatric physician shall be recognized and permitted to supervise and administer hyperbaric oxygen following the published recommendations of the Undersea and Hyperbaric Medical Society, Inc. (UHMS) and within the credentials and bylaws of the hospital that operates the hyperbaric unit with the following stipulations:

(1) A podiatric physician practicing hyperbaric oxygen must do so in a hospital setting.

(2) The podiatric physician must, in addition, show evidence of attendance and successful completion of a hyperbaric medicine team training course that is recognized by the Undersea and Hyperbaric Medical Society. That person may only utilize hyperbaric oxygen in the treatment of the foot and ankle as recognized by the Podiatric Medical Practice Act, Texas Occupations Code, §202.001, et seq. A person shall be regarded as practicing podiatric medicine within the meaning of this law and shall be deemed and construed to be a podiatric physician, who shall treat or offer to treat any disease or disorder, physical injury, or deformity, or ailment of the human foot by any system or method.

(3) Prior to administering hyperbaric oxygen, a podiatric physician must have on file with the Texas State Board of Podiatric Medical Examiners documentation certifying compliance with the above requirements.

(4) Annual Renewal

(A) HBO certificates shall be renewed annually by submitting a registration application, and paying a $25 fee to the Board by cashier's check or money order. All HBO certificates shall be renewed by January 31 of each calendar year.

(B) If the annual registration fee is not received on or prior to the expiration date of the registration, the following penalty will be imposed:

(i) one to 90 days late--$5.00 plus the annual registration fee;

(ii) over 90 days late--registration may not be renewed. The person may obtain a new registration by complying with the requirements and procedures for obtaining an original certification.

(C) Registrants shall inform the Board of any address change or change of hospital setting no later than 10 business days after the change is made.

(5) When a certificate is issued, it must be clearly displayed in the office alongside the original license.

(6) A copy of the published recommendations of the Undersea and Hyperbaric Medical Society, Inc., are available from the Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216.

§375.7. Nitrous Oxide/Oxygen Inhalation Conscious Sedation Guidelines.

(a) Permits.

(1) To employ nitrous oxide/oxygen inhalation conscious sedation for any medical purpose, the podiatric physician must obtain a permit from the Texas State Board of Podiatric Medical Examiners.

(2) Any podiatric physician who is employing nitrous oxide/oxygen inhalation conscious sedation on the effective date of this regulation must apply for the permit in order to continue using nitrous oxide/oxygen inhalation conscious sedation.

(3) The Texas State Board of Podiatric Medical Examiners may at any time at its own discretion and without prior notification require an on-site office evaluation to determine that all standards regarding nitrous oxide/oxygen inhalation conscious sedation are being met.

(4) Once a permit for nitrous oxide/oxygen inhalation conscious sedation is issued, the Texas State Board of Podiatric Medical Examiners shall renew the permit by January 31 of each year, unless the Board determines that for good cause an evaluation of the permit is appropriate, and of which the permit holder shall be promptly and fully informed so as to prevent inadvertent use of the technique when the permit status is in question. A permit will not be renewed if a current three-year certificate of inspection of the gas machine is not filed with the Board.

(5) Permits shall be renewed annually by submitting a registration application, and paying a $25 fee to the Board by cashier's check or money order. All permits shall be renewed by January 31 of each calendar year.

(A) If the annual registration fee is not received on or prior to the expiration date of the registration, the following penalty will be imposed:

(i) one to 90 days late--$5.00 plus the annual registration fee;

(ii) over 90 days late--registration may not be renewed. The person may obtain a new registration by complying with the requirements and procedures for obtaining an original certification.

(B) Registrants shall inform the Board of any address change no later than 10 business days after the change is made.

(6) When a permit is issued, it must be clearly displayed in the office alongside the original license.

(b) Overview/Direct Supervision

(1) Conscious sedation is the production, be pharmacological or non-pharmacological methods, or a combination thereof, of an altered level of consciousness in a patient.

(2) Conscious sedation of a patient by nitrous oxide is the administration by inhalation of a combination of nitrous oxide and oxygen producing a minimally depressed level of consciousness while retaining the patient's ability to maintain a paten airway independently and continuously, and to respond appropriately to physical stimulation and verbal command.

(3) Conscious sedation of a patient by nitrous oxide shall be induced, maintained, and continuously supervised only by the podiatric physician or by the assistant under continuous *direct* supervision of the podiatric physician. The nitrous oxide shall not be flowing if the podiatric physician is *not* present in the room.

(c) Office Safety Criteria/Equipment and Medical Supplies

(1) Equipment used must meet the following safety criteria: The gas machine must have

(A) 30% minimum oxygen flow;

(B) glass flow tubes;

(C) nitrous oxide fail-safe (will not flow without oxygen);

(D) automatic room air intake in the event the bag is empty;

(E) non-rebreathing check valve;

(F) oxygen flush; and

(G) auxiliary oxygen outlet with one demand valve resuscitation assembly per office.

(2) All podiatric physicians administering nitrous oxide must have a functioning vacuum system (in case of vomiting or aspiration).

(3) All podiatric physicians administering nitrous oxide must have a scavenger system (to collect nitrous oxide in the office).

(4) All podiatric physicians administering nitrous oxide must have appropriate emergency drugs and equipment for resuscitation.

(5) The office should be equipped with a manifold to provide for protection against overpressure. The manifold must be equipped with an audible alarm system. The machine must have a service check on a three-year basis, and a copy of the service check is to be filed with the office of the Texas State Board of Podiatric Medical Examiners.

(6) There must be a method of locking the nitrous oxide tanks after business hours.

(d) Nitrous Oxide/Oxygen Inhalation Conscious Sedation Permit Requirements.

(1) To induce and maintain nitrous oxide/oxygen inhalation conscious sedation of patients having podiatric surgical procedures in the State of Texas, the following requirements must be met;

(2) Professional Requirements. To use nitrous oxide/oxygen inhalation conscious sedation on a patient for podiatric medical purpose in the State of Texas, the podiatric physician must first provide to the Texas State Board of Podiatric Medical Examiners documentary proof that:

(A) The podiatric physician has completed a didactic and clinical course which includes aspects of monitoring patients and the hands-on use of the gas machine approved by the Texas State Board of Podiatric Medical Examiners approved post-graduate residency training program. The didactic and clinical course must:

(i) be directed by a licensed and certified M.D., D.O., D.D.S., or D.P.M., in the State of Texas with advanced educational and clinical experience with routine administration of nitrous oxide/oxygen inhalation conscious sedation;

(ii) include a minimum of four (4) hours didactic work in pharmacodynamics of nitrous oxide/oxygen inhalation conscious sedation;

(iii) include a minimum of six (6) hours of clinical experience under personal supervision.

(B) The podiatric physician has completed a continuing medical education course in nitrous oxide/oxygen inhalation conscious sedation that includes training in the prevention and management of emergencies in the podiatric medical practice.

(C) The podiatric physician must have completed a basic and advanced CPR program sponsored by either the American Heart Association or the American Red Cross. Proof of current certification shall be the responsibility of the podiatric physician. Additionally, the D.P.M. shall provide documented training or emergency procedures to his/her personnel.

(e) Auxiliary Personnel. All auxiliary personnel employed in Texas in an office of a podiatric physician and who shall assist in the nitrous oxide/oxygen inhalation conscious sedation procedure shall be trained in basic life support and shall have annual reviews of emergency protocols, contents and use of emergency equipment, and basic cardiopulmonary resuscitation. Documentation verifying these annual reviews shall be maintained in the office of the podiatric physician who employs the auxiliary personnel and shall be submitted upon demand to the Texas State Board of Podiatric Medical Examiners.

(f) Pre-operative Evaluation. The podiatric physician shall evaluate and document in the patient's medical record, prior to the nitrous oxide/oxygen inhalation conscious sedation procedure, the patient's health and medical status to insure that nitrous oxide/oxygen inhalation conscious sedation is medically appropriate.

§375.9. Consumer Information/Complaint Sign.

(a) In order for the public to be informed regarding the functions of the Board and the Board's procedures by which complaints are filed with and resolved by the Board, each licensee is required to display in each podiatric medical office information regarding the Board's name, address, and telephone number.
Figure: 22 TAC §375.9(a)

(b) The licensee must display a sign furnished by the Board or provide to all patients and consumers a brochure that notifies consumers or recipients of services of the name, mailing address, and telephone number of the Board and a statement informing consumers or recipients of services that complaints against a licensee can be directed to the Board.

(c) The sign shall be conspicuously and prominently displayed in a location where it may be seen by all patients. The consumer brochure, if chosen, must be prominently displayed and available to patients and consumers at all times.

§375.11. Offices.

(a) It is an objective of the Podiatric Medical Practice Act and a policy of the Board that the public be properly informed concerning the availability and level of podiatric medical services in every community where a podiatric medical office is located. To accomplish this objective, a podiatric physician shall not establish or be affiliated with an office which does not comply with these sections.

(b) All podiatric medical offices shall contain the minimum amount of treatment equipment and facilities so that the podiatric physician may provide his usual and customary podiatric medical services.

(c) The office shall be attended by the podiatric physician on a routine schedule and frequently enough so that treatment is timely and convenient for the patients in the area where the office is located.

(d) All offices shall be staffed or equipped so that patients and the public can conveniently determine when the podiatric physician will be in his office. Examples of how this information might be provided are an answering service or an automatic telephone listening and recording device of some type.

(e) This section does not prohibit a podiatric physician from practicing in communities which are too small to economically justify or otherwise warrant the establishment of an office, but when a podiatric physician undertakes to practice in such communities, he must have sufficient staff and equipment or facilities available to provide safe treatment.

§375.13. Public Participation in Meetings.

A scheduled time shall be established on each posted agenda to allow the opportunity for public comment on any issue under the jurisdiction of the Board. The time allowed an individual spokesperson may be limited at the discretion of the chair.

§375.15. Relationships with Other Practitioners.

A podiatric physician shall not aid an unethical practitioner or engage in any subterfuge with any person, business, or organization. He shall expose any illegal, unethical, or dishonest conduct of other practitioners and cooperate with those invested with the responsibility of enforcement of the law and these rules of conduct.

§375.17. Identity of Surgeon.

A person under a podiatric physician's care or treatment on whom podiatric medical surgery is to be performed in connection with such care or treatment should be informed by the podiatric physician of the identity of the surgeon before the surgery is performed.

§375.19. Fees and Informed Consent.

(a) The podiatric physician has special knowledge which his patient does not have; therefore, to avoid misunderstanding he should advise his patient in advance of beginning treatment of the nature and extent of the treatment needed; the approximate time required to perform the recommended treatment and services; and any further or additional services or return by the patient for treatment, adjustments, or consultation and the time in which this shall occur. A podiatric physician should inform his patients as to the fees to be charged for services before the services are performed, regardless of whether the fees are charged on a case basis, on the basis of a separate charge for each service, or a combination of these two methods, or some other basis. If an exact fee for a particular service, as in extended care cases, cannot be quoted to a patient, a fair and reasonable estimate of what the fee will be and the basis on which it will be determined should be given the patient.

(b) A podiatric physician shall not tender or receive a commission for a referral.

§375.21. Records.

(a) All podiatric physicians shall make, maintain, and keep accurate records of the diagnosis made and the treatment performed for and upon each of his or her patients for reference and for protection of the patient for at least five years following the completion of treatment.

(b) The records of the identity, diagnosis, evaluation, or treatment of a patient by a podiatric physician that are created or maintained by a podiatric physician are the property of the podiatric physician.

(c) A podiatric physician shall furnish copies of medical records or a summary or narrative of the medical records pursuant to a written request by the patient or by a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage his or her personal affairs, or an attorney ad litem appointed for the patient or personal representative if the patient is deceased, except if the podiatric physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient. The podiatric physician may delete confidential information about another patient or family member of the patient who has not consented to the release.

(d) The requested copies of medical records of a summary or narrative of the records shall be furnished by the podiatric physician within 30 days after the date of the request and reasonable fees for furnishing the information shall be paid by the patient or someone on behalf of the patient.

(e) As referenced in subsection (c) of this section, if the podiatric physician denies the request for copies of medical records or a summary or narrative of the records, either in whole or in part, the podiatric physician shall furnish the patient a written statement, signed and dated, stating the reason for the denial, and a copy of the statement denying the request shall be placed in the patient's medical records.

(f) The podiatric physician responding to a request for such information shall be entitled to receive a reasonable fee for providing the requested information. A reasonable fee shall be a charge of no more that $25 for the first twenty pages and $0.15 per page for every copy thereafter. In addition, a reasonable fee may include actual costs for mailing, shipping, or delivery of the records and x-rays.

(g) Copies of original x-rays requested by the patient must be provided to the patient for a fee of $25 per x-ray plate within a 30 day period.

(h) The podiatric physician providing copies of requested medical records or a summary or a narrative of such medical records shall be entitled to payment of a reasonable fee prior to release of the information unless the information is requested by a health care provider licensed in Texas or licensed by any state, territory, or insular possession of the United States or any State or Province of Canada if requested for purposes of emergency or acute medical care. In the event the podiatric physician receives a proper request for copies of medical records or a summary or narrative of the medical records for purposes other than for emergency or acute medical care, the podiatric physician may retain the requested information until payment is received. In the event payment is not routed with such a request, within ten calendar days from receiving a request for the release of such medical records for reasons other than emergency or acute medical care, the podiatric physician shall notify the requesting party in writing of the need for payment and may withhold the information until payment of a reasonable fee is received. A copy of the letter regarding the need for payment shall be made part of the patient's medical record. Medical records requested pursuant to a proper request for release *may not* be withheld from the patient, the patient's authorized agency, or the patient's designated recipient for such records based on a past due account for medical care or treatment previously rendered to the patient.

(i) A subpoena shall not be required for the release of medical records requested pursuant to a proper release for records under this section made by a patient or by the patient's guardian or other representative duly authorized to obtain such records.

(j) In response to a proper request for release of medical records, a podiatric physician shall not be required to provide copies of billing records pertaining to medical treatment of a patient unless specifically requested pursuant to the request for release of medical records.

(k) The allowable charges as set forth in this chapter shall be maximum amounts, and this chapter shall be construed and applied so as to be consistent with lower fees or the prohibition or absence of such fees as required by state statute or prevailing federal law.

§375.23. Reporting Medical Professional Liability Claims.

(a) Reporting responsibilities. The reporting form must be completed and forwarded to the Texas State Board of Podiatric Medical Examiners for each defendant podiatric physician against whom a professional liability claim or complaint has been filed. The information is to be reported by insurers or other entities providing medical professional liability insurance for a podiatric physician. If an insurance carrier does not adequately report, reporting shall be the responsibility of the podiatric physician.

(b) Separate reports required and identifying information. One separate report shall be filed for each defendant insured podiatric physician. When Part II is filed it shall be accompanied by the completed Part I or other identifying information as described in subsection (d)(1) of this section.

(c) Timeframes and attachments. The information in Part I of the form must be provided within 30 days of receipt of the claim or suit. A copy of the claim letter or petition must be attached. The information in those claims where a court order has been entered, a settlement agreement has been reached, or the complaint has been dropped or dismissed.

(d) Alternate reporting formats. The information may be reported either on the form provided or in any other legible format which contains at least the requested data.

(1) If the reporter elects to use a reporting format other than the board's form for data required in Part II, there must be enough identification data available to enable Board staff to match the closure report to the original file. The data required to accomplish this include:

(A) name and license number of defendant podiatric physician(s); and

(B) name of plaintiff.

(2) A court order or settlement agreement is an acceptable alternative submission for Part II. An order or settlement agreement should contain the necessary information to match the closure information to the original file. If the order or agreement is lacking some of the required data, the additional information may be legible written on the order or agreement.

(e) Penalty. Failure by a licensed insurer to report under this section shall be referred to the State Board of Insurance. Sanctions under the Insurance Code, Article 1.10, §7, may be imposed for failure to report.

(f) Definition. For the purposes of this chapter a professional liability claim or complaint shall be defined as a cause of action against a podiatric physician for treatment, or other claimed departure from accepted standards of medical or health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract to include interns, residents, supervising podiatric physicians, on-call podiatric physicians, consulting podiatric physicians, and those podiatric physicians who administer, read, or interpret laboratory tests, x-rays, and other diagnostic studies.

(g) Claims not required to be reported. Examples of claims that are not required to be reported under this chapter but which may be reported include, but are not limited to, the following:

(1) Product liability claims (i.e. where a podiatric physician invented a medical device which may have injured a patient but the podiatric physician has had no personal podiatric physician-patient relationship with the specific patient claiming injury by the device);

(2) antitrust allegations;

(3) allegations involving improper peer review activities;

(4) civil rights violations; or

(5) allegations of liability for injuries occurring on a podiatric physician's property, but not involving a breach of duty in the podiatric physician-patient relationship (i.e. slip and fall accidents);

(6) business disputes (i.e. podiatric employer-employee dispute, partnership breakups, managed care contract disputes).

(h) Claims that are not required to be reported under this chapter may however be voluntarily reported pursuant to the provisions of the Podiatric Medical Practice Act of Texas, Texas Occupations Code §202.353.

(i) The reporting form shall be as follows.
Figure: 22 TAC §375.23(i)

§375.25. Severability.

If any section or portion of a section is held for any reason to be invalid or inapplicable to any person, such decision shall not affect the validity of any remaining portion or portions of these sections.

§375.27. Report Change of Practice Address and/or Phone Number to the Board.

It shall be the responsibility of each licensee to ensure that any change of address or phone number(s) for each licensees location(s) are reported in writing, via e-mail, facsimile or mail to the board no later than ten business days after the change is made. Failure to give written notification to the board of these changes writing the required ten business days shall result in an automatic administrative penalty of $10, for each business day that the information is not reported to the board. The maximum penalty shall not exceed $300.

§375.29. Compliance with Orders, Subpoenas, and Investigations.

(a) A licensee shall comply with all board orders and subpoenas.

(b) A licensee shall cooperate fully and promptly in any board investigation of the licensee. Cooperation shall include but not be limited to the following:

(1) responding to any notice of violation, notice of investigation, or other board correspondence, and

(2) providing documentation requested pursuant to an investigation or notice of violation that the licensee possesses, control, or to which the licensee has access.

(c) Any licensee who does not comply with any provision of this rule shall at the discretion of the Board be subject to a penalty of $100 per day not to exceed $5000.

§375.31. General Authority of Podiatrist to Delegate.

(a) A podiatrist licensed under Chapter 371 of this title (relating to Examinations and Licensure) may delegate to a qualified and properly trained person acting under the podiatrist's appropriate supervision any medical act that a reasonable and prudent podiatrist would find within the scope of sound medical judgment to delegate if:

(1) the act:

(A) can be properly and safely performed by the person to whom the medical act is delegate;

(B) is performed in its customary manner; and

(C) is not in violation of any other statute; and

(2) the person to whom the delegation is made does not represent to the public that the person is authorized to practice podiatric medicine.

(b) The delegating podiatrist remains responsible for the medical acts of the person performing the delegated medical acts.

(c) The Texas State Board of Podiatric Medical Examiners may determine whether:

(1) an act constitutes the practice of podiatric medicine.

(2) a medical act may be properly or safely delegated by podiatrists.

§375.33. Sexual Misconduct.

(a) Explanations/Conduct.

(1) Sexual misconduct is behavior that exploits the physician-patient or physician-staff member relationship in a sexual way. This behavior is non-diagnostic and non-therapeutic, may be verbal or physical, and may include expressions of thoughts and feelings or gestures that are sexual or that reasonably may be construed by a person as sexual.

(2) There are three levels of sexual misconduct: sexual violation, sexual impropriety and sexual exploitation. Behavior listed in

all three levels may be the basis for disciplinary action by the Board if the Board finds that the behavior was injurious or an exploitation of the physician-patient or physician-staff member relationship.

(A) Sexual violation may include physician-patient or physician-staff member sex, whether or not initiated by the patient/staff, and engaging in any conduct with a patient/staff that is sexual or may be reasonably interpreted as sexual, including but not limited to:

(i) Sexual intercourse, genital-to-genital contact.

(ii) Oral to genital contact.

(iii) Oral to anal contact, genital to anal contact.

(iv) Kissing in a romantic or sexual manner.

(v) Touching breasts, genitals, or any sexualized body part for any purpose other than appropriate examination or treatment, or where the patient/staff has refused or has withdrawn consent.

(vi) Encouraging the patient/staff to masturbate in the presence of the physician or masturbation by the physician while the patient/staff is present.

(vii) Offering to provide practice-related services, such as drugs, in exchange for sexual favors.

(B) Sexual impropriety may comprise behavior, gestures, or expressions that are seductive, sexually suggestive, or sexually demeaning to a patient/staff, including but not limited to:

(i) Disrobing or draping practices that reflect a lack of respect for the patient's/staff's privacy, deliberately watching a patient/staff dress or undress, instead of providing privacy for disrobing.

(ii) Subjecting a patient/staff to an intimate examination in the presence of medical students or other parties without the explicit consent of the patient/staff or when consent has been withdrawn.

(iii) Examination or touching of genitals without the use of gloves.

(iv) Inappropriate comments about or to the patient/staff, including but not limited to making sexual comments about a person's body or underclothing, making sexualized or sexually demeaning comments to a patient/staff, criticizing the patient's/staff's sexual orientation (transgender, homosexual, heterosexual, or bisexual), making comments about potential sexual performance during an examination or consultation except when the examination or consultation is pertinent to the issue of sexual function or dysfunction, requesting details of sexual history or sexual likes or dislikes when not clinically indicated for the type of consultation.

(v) Engaging in treatment or examination of a patient/staff for other than bona fide health care purposes or in a manner substantially inconsistent with reasonable health care practices.

(vi) Using the physician-patient or physician-staff member relationship under the pretext of treatment to solicit a date.

(vii) Initiation by the physician of conversation regarding the sexual problems, preferences, or fantasies of the physician.

(viii) Examining the patient/staff intimately without consent.

(C) Sexual exploitation by a physician is the breakdown of the professionalism in the physician/patient/staff relationship constituting sexual abuse. Sexual exploitation may undermine the therapeutic relationship, may exploit the vulnerability of the patient/staff, and ultimately may be detrimental to the patient's/staff's emotional well-being, including but not limited to:

(i) Causing emotional dependency of the patient/staff;

(ii) Causing unnecessary dependence outside the therapeutic relationship;

(iii) Breach of trust;

(iv) Imposing coercive power over the patient/staff.

(3) A third impartial person who is the same sex as the patient must be present in the examining room if a patient is asked to disrobe or if the genitalia are examined.

(b) Investigation of Sexual Misconduct.

(1) A board or private investigator may be used in the investigation of sexual misconduct. The evaluator must release to the Board all records pertaining to the identity, diagnosis, prognosis, and treatment of such physician. Such records should include but not be limited to those records maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research. Upon completion of the evaluation, results must be released to the Board.

(2) The physician under investigation may be required to have a complete medical evaluation, including appropriate mental and physical examination. Laboratory examination should include appropriate urine and blood drug screens.

(3) The psychiatric history and mental status examination is to be performed by a psychiatrist knowledgeable in the evaluation suspected of sexual misconduct. The examination may include neuropsychological testing.

(c) Disciplinary Options for Sexual Misconduct. Sexual violation or impropriety may warrant disciplinary action by the Board up to and including revocation of license granted by the Board.

(d) License Reinstatement after Sexual Misconduct. In the event a physician applies for license reinstatement, any petition for reinstatement will include the stipulation that additional mental and physical evaluations may be required prior to the Board's review for reinstatement to ensure the continuing protection of the public.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

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Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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CHAPTER 376. VIOLATIONS AND PENALTIES

22 TAC §§376.1 - 376.11, 376.21

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§376.1 - 376.11 and §376.21, concerning Violations and Penalties. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§376.1. Disciplinary Action.
§376.2. Administrative Penalties.
§376.3. Probation of Order.
§376.4. Rescission of Probation.
§376.5. Board Discretion Regarding Penalties.
§376.6. Agreed Orders.
§376.7. Conditions of Suspension of License.
§376.8. Educational Courses.
§376.9. Complaint Form.
§376.10. Investigations of Complaints Filed with the Board.
§376.11. Office Inspections.
§376.21. Definitions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

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Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
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For further information, please call: (512) 305-7000

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22 TAC §§376.1, 376.3, 376.5, 376.7, 376.9, 376.11, 376.13, 376.15, 376.17, 376.19, 376.21, 376.23, 376.25, 376.27, 376.29, 376.31, 376.33, 376.35

The Texas State Board of Podiatric Medical Examiners proposes new §§376.1, 376.3, 376.5, 376.7, 376.9, 376.11, 376.13, 376.15, 376.17, 376.19, 376.21, 376.23, 376.25, 376.27, 376.29, 376.31, 376.33, and 376.35, concerning Violations and Penalties. The new sections are being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. Section 376.5 increases the maximum penalty per violation from $2,500 to $5,000 per Sunset requirements. Section 376.15 gives the board the authority to issue Cease and Desist Orders per Sunset requirements. Section 376.17

gives the board the authority to issue Refund Orders per Sunset requirements. Refund Orders are not a means for a patient to seek restitution from the physician beyond actual out-of-pocket costs rendered for podiatric services provided. For example, a patient may not seek a refund for pain and suffering or a refund of required co-payments. Section 376.19(a) clarifies other actions which rise to the level of a criminal penalty of practice without a license as provided in Texas Occupations Code, §202.605. Section 376.19(c) responsive to Sunset provisions authorizing unannounced visits, this provision allows for the board to investigate whether or not a licensee on suspension is practicing podiatry without a license. Section 376.21 provides for the Temporary Suspension of a License per Sunset requirements for situations that pose an immediate threat to public welfare. Section 376.27(a) clarifies to the public the means and manner in which complaints can be filed with the Board and also describes categories of jurisdictional complaints investigated by the Board responsive to Sunset requirements. Section 376.27(b) clarifies that the Board shall periodically notify the complaint parties of the status of the complaint until final disposition per Sunset requirements. Section 376.27(d) provides that all board actions will be reported to the National Practitioner Data Bank-Healthcare Integrity Protection Data Bank as required by federal law. Section 376.27(f) identifies the Board's role and duty in pursuing alleged crimes by conducting requisite criminal investigations and cooperating with law enforcement agencies in the further investigation and prosecution of those crimes. This section is also responsive to the Board's duties related to conducting criminal background checks through the Texas Department of Public Safety, the Federal Bureau of Investigation and any other means necessary to ensure the proper practice of podiatric medicine. Section 376.29 gives the board the authority to Monitor Licensee Compliance per Sunset requirements. Section 376.31 is responsive to Sunset provisions related to the Consequences of Background and Criminal History Checks also involving guidelines required by Texas Occupations Code, Chapter 53.

Hemant Makan, Executive Director, has determined that for each year of the first five years the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Makan has also determined that for each year for the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to clarify the Board's increased enforcement authority authorized by certain Sunset provisions to ensure that the public is comprehensively protected from podiatric physicians acting in any manner detrimental to public health and welfare. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The new sections are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the laws regulating the practice of podiatry.

The proposed new sections implement the reorganization of current Chapter 376. This Chapter will remain separate but has been updated to reflect certain Sunset provisions. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. Provisions related to reporting Board disciplinary actions to the National Practitioner Databank--Healthcare Integrity Protection Databank implement Section 1921 and Section 1128E of the Social Security Act. Provisions related to the Consequences of Background and Criminal History Checks implement Texas Occupations Code, Chapter 53, House Bill 660 pursuant to the acts of the 78th Legislature and implementation of Texas Government Code, §411.087 and §411.122. Provisions related to criminal investigations are also responsive to all titles found within the Texas Penal Code as executed through the Texas Code of Criminal Procedure, and efforts to fight waste, fraud and abuse pursuant to Governor Perry's Executive Order RP-36.

§376.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise: *Investigator*--Employee, Agent or Person designated by the board to conduct investigations on behalf of the board. The term includes Podiatric Medical Reviewers.

§376.3. Penalties.

(a) A podiatric physician who violates a board rule, order, or any provision of the Act shall be subject to the following disciplinary action:

(1) suspension or revocation of the license to practice podiatric medicine; or

(2) temporary suspension of a license as determined by a disciplinary panel; or

(3) a reprimand by the Board which may be either public or private; or

(4) a probated suspension and

(A) valid enrollment in and certified full and complete attendance at any medical educational course or courses, including any residency, or any course in ethics in practice, as deemed appropriate by the Board; or

(B) valid enrollment in and certified full and complete attendance at any rehabilitation program deemed appropriate by the Board; or

(5) administrative penalties; or

(6) any combination of the penalties listed in this section.

(b) The Board shall revoke a license of a podiatric physician (licensee) if that licensee has been convicted of a felony under Chapter 36, Subchapter D, §36.132 of the Human Resources Code, to wit:

(1) a state jail felony if the value of any payment or monetary in-kind benefit provided under the Medicaid program, directly or indirectly, as a result of an unlawful act is $1,500 or more but less than $20,000;

(2) a felony of the third degree if the value of any payment or monetary benefit provided under the Medicaid program, directly or indirectly, as a result of an unlawful act is $20,000 or more, but less than $100,000;

(3) a felony of the second degree if the value of any payment or monetary or in-kind benefit provided under the Medicaid program directly or indirectly, as a result of the unlawful act if $100,000 or more but less than $200,000;

(4) a felony of the first degree if the value of the payment or monetary or in-kind benefit provided under the Medicaid program, directly or indirectly, as a result of the unlawful act is $200,000 or more.

§376.5. Administrative Penalties.

(a) The Board may impose an administrative penalty against any licensee who violates any provision of the Act or rule or order of the Board. The Executive Director or his/her designee may assess a penalty for each violation and present a report to the Board concerning the facts on which the determination was based and the amount of the penalty. The range of penalty is $500 to $5,000 per violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(b) The amount of the penalty shall be based on:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(2) the economic harm to property or the environment caused by the violation;

(3) the history of previous violation;

(4) the amount necessary to deter future violations;

(5) efforts to correct the violation; and

(6) any other matter that justice may require.

(c) The board shall utilize a penalty schedule to determine the amount of the violation based on the factors listed in subsection (b) of this section.
Figure: 22 TAC §376.5(c)

(d) The provisions of this section shall not be construed so as to prohibit other appropriate civil or criminal action and remedy and enforcement under other laws. The provisions of this section shall be carried out in accordance with the requirements of the Act.

(e) If the licensee does not agree with the imposition of the administrative penalty, the licensee may request a hearing before the State Office of Administrative Hearings as stated in §376.27 of this title (relating to Investigations of Complaints Filed with the Board).

(f) If the licensee requests a hearing or fails to respond within 20 days after receiving notice of the proposed penalty, the Executive Director shall set a hearing and give notice to the licensee of the hearing.

(g) If the final order of the Board imposes an administrative penalty against a licensee, the licensee may pay the amount of the penalty, pay the amount of the penalty and file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both, or the licensee may, without paying the penalty, file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both pursuant to Texas Occupations Code, Chapter 202, Subchapter L, §§202.551 - 202.561.

(h) Judicial review of the order of the Board:

(1) is instituted by filing a petition as provided in the Texas Government Code Annotated §2001.171 et seq. and subsequent amendments; and

(2) is under the substantial evidence rule.

(i) All such penalties shall be made a permanent part of the licensee's record at the Board office that is to be maintained according to the laws of the State of Texas and these rules.

§376.7. Probation of Penalty.

A board order to revoke, cancel or suspend a license may be probated in whole or in part at the discretion of the Board.

§376.9. Institution of Action by the Board.

(a) The Board may rescind, in part or in whole, the probation of any order upon a showing of any violation of statutes or rules governing the practice of Podiatric Medicine, or of any state or federal laws.

(b) The hearing to rescind probation shall be before the Board. The respondent or counsel for the respondent, and any person complaining of the respondent, or that person's counsel shall be given at least ten days notice of the hearing.

(c) Neither pre-hearing discovery nor informal conference will be permitted prior to the hearing, unless as agreed to by all parties.

(d) Respondent and any person complaining of respondent may request that the Board issue subpoenas for the appearance of witnesses and production of documents at the hearing. The Board may issue subpoenas on its own motion.

§376.11. Board Discretion Regarding Penalties.

The Board shall have complete discretion to impose penalties as are reasonable and fair and in accordance with due process in light of all the evidence adduced in each case, the difficulty or proof of elements of the case, the credibility of evidence or witnesses for the State or the licensee, the harm caused by the violation, and other similar considerations, including a comparison with the penalties previously assessed in similar cases and circumstances.

§376.13. Agreed Orders.

The Board may enter into negotiated Agreed Orders with negotiated penalties when, in the Board's discretion, full hearing of the case is impractical, unnecessary, or not in the best interest of the State due to such factors as difficulties in pursuing discovery, risk of obtaining adequate evidence or proof, or the length of time accrued since the alleged violation and the possibility of stale evidence, and other similar considerations.

§376.15. Cease and Desist Orders.

(a) The board may serve a cease and desist order on a person the board believes is engaging or is likely to engage in an activity that is violation of this Act or another state statute or rule relating to the practice of podiatry, The order must:

(1) be delivered by personal delivery or registered or certified mail, return receipt requested, to the person's last known address;

(2) state the acts or practices alleged to be an unauthorized activity; and

(3) state the effective date of the order, which may not be before the 21st day after the date the order is received.

(b) The person may request a hearing before the 22nd day after the date of receiving the order.

(c) The board shall hold the hearing not later than the 30th day after the date the board receives the request for the hearing.

(d) The board may impose an administrative penalty against a person who violates an order issued under this section.

(e) The board may refer the violation to the Attorney General for further action.

§376.17. Refund Orders.

(a) The board may order a licensee to pay a refund to a patient as part of an agreement resulting from an informal settlement conference.

(b) The refund may be used instead of or in addition to an administrative penalty imposed by the board.

(c) The amount of the refund agreed to in the agreed order may not exceed the charges for the services rendered by the licensee.

(d) The refund order is limited to the amount that the patient paid for services rendered by the licensee and cannot require payment for other damages or estimate of harm.

§376.19. Conditions of Suspension of License.

(a) Suspension of a license means that the office of the licensee is to be closed for the purposes of receiving, diagnosing, treating, or consulting with patients, and the licensee may not participate for income in any professional activity that is directly related to diagnosis or treatment of a patient or activities that involve consultation services related to management of a practice. The licensee may refer patients to another practitioner for treatment or consultation during the period of the suspension, but the licensee shall not derive any income from such referrals. The licensee may allow another practitioner to see the licensee's patients during the period of the suspension the licensee's office or other practitioner's office, but the licensee shall derive no income from the other practitioner by way of referral fees, or the like.

(b) The licensee's office may remain open for the purposes of administrative work, including making future appointments, arranging referrals, handling mail, processing accounts, billing, and insurance matters, and other similar matters not directly related to the diagnosis and treatment of patients.

(c) If the suspended licensee shares offices with another practitioner, the other practitioner shall be allowed to continue to practice, but the suspended licensee shall not share income with the other practitioner, including any income derived in any way from the diagnosis or treatment of patients. The board may, through unannounced visits or by requesting documentation, check on the business arrangement that the suspended practitioner has with the other practitioner(s) regarding the renting of equipment, rental of business facilities, referral fees or any other negotiated arrangement so as to be sure that the suspended practitioner is not deriving any monies from the practice of podiatric medicine.

(d) If a license suspension is probated, the Board may required the licensee to:

(1) report regularly to the Board on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by the Board; or

(3) continue or review continuing professional education until the licensee attains a degree of skill satisfactory to the Board in those areas that are the basis of the probation.

§376.21. Temporary Suspension of a License.

(a) The president of the board shall appoint a disciplinary panel consisting of three board members to determine whether a person's license to practice podiatry should be temporarily suspended.

(b) If the disciplinary panel determines from the evidence presented to the panel that a person licensed to practice podiatry would, by the person's continued practice, constitute a continuing threat to the public welfare, the disciplinary panel shall temporarily suspend the license of that individual.

(c) A license may be suspended by the disciplinary panel without notice or hearing if:

(1) the board immediately provides notice of the suspension to the license holder; and

(2) a hearing on the temporary suspension before the disciplinary panel of the board is scheduled for the earliest date after the 10th day after the notice of hearing.

(d) The disciplinary panel may hold a meeting via a telephone conference call if immediate action is required and convening the panel at one location is inconvenient for any member of the disciplinary panel.

(e) After the hearing, if the disciplinary panel affirms the temporary suspension of the license holder's license, the board shall schedule an informal compliance meeting as soon as practicable, unless the license holder waives the informal meeting or the informal meeting has already been held regarding the basis for the temporary suspension.

(f) If the license holder is unable to show compliance at the informal meeting, a board representative shall initiate a disciplinary procedure under §202.501 of the Act.

(g) If after the hearing the disciplinary panel does not temporarily suspend the license holder's license, the facts that were the basis for the temporary suspension may not be the sole basis of another proceeding to temporarily suspend the license holder's license. The board may use those same facts in a subsequent investigation to obtain new information that may be the basis for a temporary suspension of the license holder's license. Facts that are the basis for the temporary suspension of a license holders license includes facts presented to the disciplinary panel and facts presented by the board or a representative of the board at the time evidence was presented to the disciplinary panel.

§376.23. Educational Courses.

The Board deems as approved any Continuing Medical Education Course approved by the American Podiatric Medical Association. The Board may also approve, by majority vote, substitution of a non-APMA-approved course when such is indicated by the record before the Board.

§376.25. Complaint Form.

The Board shall adopt the following form as its official complaint form. The form, along with a "Consumer Information" pamphlet explaining the Board's functions and complaint process, will be furnished to any person who wishes to file a complaint with the Board. The official complaint form is suggested for uniformity, however, any written or electronic communication that clearly advises the Board of the information required shall be deemed sufficient.
Figure: 22 TAC §376.25

§376.27. Investigations of Complaints Filed with the Board.

(a) Receipt of Complaint.

(1) All written and signed complaints filed with the Board will be investigated. Complaints may also be filed electronically via e-mail and the Board's website. Anonymous written complaints may be investigated and will be logged and filed for information purposes. Complainants who wish to complain by telephone will be advised that their complaints must be submitted in writing, must be signed by complainant, and that Board complaint forms will be mailed to them for their use and submission to the Board. A log will be maintained with names and addresses of complainants who telephone the Board offices and to whom complaint forms are mailed. The Board shall also maintain an information file for each complaint that contains a record of all

persons contacted in relation to the complaints, summary of findings at each stage of complaint process, an explanation of legal basis and reason that a complaint was dismissed, and other relevant information.

(2) When a written complaint is received at the Board Offices, the complaint will be date-stamped immediately. The complaint will then be reviewed by the Executive Director or Investigator. A complaint file will be created and the complaint will be assigned to an Investigative Liaison, who is a Board member and a licensed podiatric physician. Jurisdictional complaints investigated by the Board include, but are not limited to, allegations involving death, substance abuse, fraud, negligence, advertising, fees, records, inappropriate physician behavior, impaired physician and office inspections.

(3) If an allegation is determined to be critical in nature, it will be assigned a high priority and the requirement for written and signed complaints will be waived temporarily, but will be obtained later in the investigative process. Upon receipt of information posing a threat to public safety and welfare, the Board may initiate complaints of its own.

(b) Investigation of Allegations.

(1) Upon receipt of the written allegation and/or determination of a high priority issue, the Executive Director or Investigator will assure that the complaint information is entered into the computer and given a file number. A letter of acknowledgment will be promptly mailed to the complainant. Case files will be reviewed from time to time as needed to insure cases comply with scheduling.

(2) Depending on the type of allegations and/or violations at issue, the investigation of the complaint will usually be conducted in accordance with the following guidelines:

(A) After a signed and written complaint is received, the Executive Director or Investigator may interview the complainant either in person or over the telephone so that the complainant has an opportunity to explain or elaborate upon the allegations made in the complaint. If the allegation is a misunderstanding and/or without merit, the Executive Director or Investigator informs the Investigative Liaison a recommendation that the case be closed upon submission of a written report to and with concurrence of the Investigative Liaison informs the complainant that the case be closed.

(B) After the complainant's statement has been obtained, and the Executive Director or Investigator determines that a potential violation exists, the licensee is informed of the nature of the allegations in the complaint. All the records and files of the Board shall be public records and open to inspection at reasonable times, except the investigations files and records which are confidential. Patient records may be requested to assist in the investigation. The licensee is given an opportunity to respond to the allegations either in an interview with the Executive Director or Investigator or by giving a narrative statement via mail or FAX or electronic means. The licensee may be provided a copy of the complaint unless providing a copy of the complaint would jeopardize the investigation.

(C) At any time before a complaint is resolved, further investigation may be necessary in the form of second or third opinions, obtaining supporting documents, interviewing other witnesses, etc., depending on the case at hand. During the course of the investigation, the board will periodically notify the complainant of the status of the complaint until final disposition, unless the notification would jeopardize an undercover investigation.

(D) If the case does not require the medical judgment of the Investigative Liaison, and the Executive Director or Investigator concludes, after all elements have been investigated, that a violation probably exists the Executive Director or Investigator shall compose and mail to the licensee an Agreed Order inviting the licensee to an informal hearing on the Agreed Order to discuss the allegations made against the licensee. If the Executive Director or Investigator concludes that the complaint has no merit, the Executive Director or Investigator will apprise the Investigative Liaison assigned to the case and authorize closing the case. The Executive Director or Investigator will assure the complainant and licensee are notified by letter explaining the action taken on the dismissed complaint.

(E) If the case does require the medical judgment of the Investigative Liaison, and the Executive Director or Investigator concludes, after all relevant elements have been investigated, that a violation probably exists, the Executive Director or Investigator shall send copies of pertinent documents, along with a cover letter to the Investigative Liaison, who will assist in determining whether the case should be closed, further investigation is warranted, or the licensee should be invited to respond to the allegations at a conference. If the case is closed, the complainant and the licensee will be notified by letter explaining the action taken on the dismissed complaint.

(F) If an informal hearing on the Agreed Order is recommended, the Executive Director or Investigator shall, by certified mail, mail to the licensee an Agreed Order with a list of allegations. The conference is conducted in accordance with the Texas Government Code Annotated §2001.054 et. seq., and is part of the investigatory process. The licensee is advised that he or she has the right to counsel. The allegations are presented to the licensee and the licensee is given every opportunity to present his or her side of the issue. The licensee shall also have the right to waive the conference, in which case the investigation shall proceed to the next step in the disciplinary process. In attendance at the conference are the Executive Director or Investigator, the Investigative Liaison assigned to the case, the Assistant Attorney General representing the Board, a public member of the board, and the complainant if the complainant desires to attend.

(G) After the licensee responds to the allegations, the Executive Director or Investigator, Investigative Liaison, and the Assistant Attorney General will review the file and the licensee's response and recommend the disposition of the complaint. If it is determined that a violation has not occurred, the case will be dismissed and all parties to the allegations will be notified by letter explaining the action taken on the dismissed complaint. The Executive Director or Investigator will advise the Board at each scheduled board meeting of the complaints dismissed since the last board meeting. The information furnished will consist of a summary of the allegations, investigation conducted, and reasons for dismissal.

(H) If it is determined that a violation has occurred and a penalty/disciplinary action is warranted, within 14 days of the date of determination a proposed agreed order shall be mailed by certified mail to the licensee. The order must include a brief summary of the alleged violation and a statement that the licensee waives the right to a hearing on the occurrence of the violation and the amount of the penalty/disciplinary action. In determining the penalty/disciplinary action, the board will utilize the complaint penalty schedule to assess the appropriate sanction based on the category of complaint and severity level.

(I) Within 20 days after the date the licensee receives the proposed order, the licensee may, in writing, accept the determination and recommended penalty, disciplinary action of the Executive Director or Investigator, propose a counter-offer, or may request, in writing, a hearing on the occurrence of the violation and the amount of the penalty.

(J) If the licensee accepts the determination and recommended penalty/disciplinary action of the Executive Director or Inves-

tigator, the Board by order shall approve the proposed agreed order or shall amend the proposed agreed order as a counter-offer.

(c) Docketed Complaint and Hearing.

(1) If the licensee declines the proposed agreed order and requests a hearing or if the licensee fails to respond timely to the proposed agreed order, a docketed complaint will be drafted and assigned a docket number. The complaint is reviewed by the Assistant Attorney General who then returns it to the agency where corrections are made, if indicated. The date the Executive Director or Investigator files the complaint with SOAH is the official date of filing the docketed complaint with the Board. The docketed complaint is then served on the licensee by certified mail or personal service at least ten days prior to a scheduled hearing.

(2) The Executive Director or Investigator shall request a hearing and give notice of the hearing to the licensee. The hearing shall be held by an administrative law judge of the State Office of Administrative Hearings. The administrative law judge shall make findings of fact, conclusions of law and promptly issue to the Board a proposal for a decision about the occurrence of the violation, the proposed disciplinary action, and the amount of the proposed penalty, if any. Based on findings of fact, conclusions of law, and proposal for a decision, the Board by order may find that a violation has occurred, impose a penalty, impose disciplinary action, or may find that no violation occurred. The complainant shall be promptly advised by letter of the final disposition of the complaint.

(3) The notice of the Board's order given to the licensee under the Texas Government Code Annotated Chapter 2001 et seq. and its subsequent amendments must include a statement of the right of the licensee to judicial review of the order.

(d) Licensee's Record. All actions taken by the Board against a licensee shall be made a permanent part of the licensee's record at the Board office reportable on the Board's website and reportable to the NPDB-HIPDB (National Practitioner Databank-Healthcare Integrity Protection Databank).

(e) Use of Private Investigators. Private investigators may be utilized in any case filed with the Board. Private investigators will be employed only when it is economically advantageous to the Board or when it is not practical for agency staff to travel to a distant destination or to another state. Private investigators will be utilized in accordance with existing state purchasing rules of the General Services Commission and will be utilized with the approval of the Executive Director and Investigative Liaison.

(f) Criminal Investigations.

(1) The Board shall cooperate with and assist any law enforcement, criminal justice or government agency in the investigation of criminal allegations or information obtained by the board in the course of an investigation that indicates that a crime may have been committed. Criminal information in the possession of the Board is confidential and may be disclosed only as necessary to conduct the investigation.

(2) The Board shall conduct criminal background checks of applicants for licensure and as necessary, for licensees under investigation, through the Texas Department of Public Safety and the Federal Bureau of Investigation as authorized by law. In pursing an investigation for licensure, the Board may also contact any other law enforcement agencies to obtain information as necessary to fulfill legislative mandates.

(3) Criminal background checks include, but are not limited to, fingerprint checks, conviction histories, arrest histories, name histories, personal identifier histories, review of court/judicial documents and histories of involvement with law enforcement or any other criminal justice agencies.

§376.29. Monitoring Licensee Compliance.

(a) The board may conduct unannounced office inspections of a podiatric practice pursuant to a written complaint, in order to properly investigate the allegations being made by the complainant, or to allow for the proper investigation of new information developed during the investigation of the original complaint. Common allegations justifying the need for an office inspection may include, but are not limited to any violation(s) of the Board's Rules or Statute, such as improper medical record keeping, safety and hygiene issues, sexual misconduct, illegal use or dispensing of prescription drugs, failure to account for drugs dispensed or administered, drug diversion or abuse and insurance fraud including Medicaid/Medicare billing.

(b) The board may enter the business premises of a person regulated by the board without notice during reasonable business hours to:

(1) investigate a complaint filed with the board; or

(2) determine compliance with an order of the board.

§376.31. Consequences of Background and Criminal History Checks.

(a) This section sets out the factors and criteria on the eligibility of persons with criminal convictions, deferred adjudications, state or federal guilty pleas on indictments and/or informations, and background information to obtain a license to practice podiatry or those already licensed who renew. The board may refuse to issue or renew a license to any individual that has been convicted of a felony, received a deferred sentence, or engaged in conduct unacceptable to the board.

(b) The practice of podiatry involves dealing with patients, their families and friends, and the public in a variety of clinical and private practice settings. The podiatrist deals with individuals who are physically, emotionally and financially vulnerable. Therefore, criminal behavior whether violent or non-violent, directed against persons, property or public order and decency is considered by the board as relevant to an individual's fitness to practice podiatry.

(c) In considering whether a criminal conviction or other background information renders the individual ineligible for licensure or renewal of licensure as a podiatrist, the board shall consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purpose of engaging in the practice of podiatry;

(3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved;

(4) the relationship of the crime to the ability, capacity, or fitness required to engage in the practice of podiatric medicine; and

(5) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude.

(d) In addition to the factors that may be considered under subsection (c) of this section, the board, in determining the present fitness of a person who has been convicted of a crime, shall consider:

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person when the crime was committed;

(3) the amount of time that has elapsed since the person's last criminal activity;

(4) the conduct and work activity of the person before and after the criminal activity;

(5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and

(6) other evidence of the person's present fitness, including letters of recommendation from prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person; the sheriff or chief of police in the community where the person resides; and any other persons in contact with the individual.

(e) It is the responsibility of the individual to obtain and provide to the board the recommendations listed under subsection (d)(6) of this section. The individual shall also furnish proof as may be required by the board that he or she has maintained a record of steady employment, maintained a record of good conduct, and has paid all outstanding costs and restitution as may have been ordered in any criminal cases following conviction.

(f) If requested, it is the responsibility of the individual to ensure that the board is provided with legible, certified copies of all court and law enforcement documentation from all jurisdictions where the individual has resided or practiced as a licensed podiatrist. Failure to provide such documentation will result in delays processing the license or renewal certificate, and possible grounds for ineligibility.

(g) The board shall utilize guidelines for determining the reasons why a particular crime is related to the practice of podiatry and other factors that affect the decision as to whether the past criminal history would render the individual ineligible for licensure.

(h) Criminal history match report hits through the Texas Department of Public Safety and Federal Bureau of Investigation shall be entered into the Board's complaint database to track criminal backgrounds and to also establish a baseline for future comparisons. Hits will be entered for tracking purposes for criminal activity but no notices will be submitted to the licensee if no further investigation is warranted. For those hits requiring further investigation, the Board will obtain the corresponding arrest/offense/police reports from the jurisdictional law enforcement agency for determination of scope of violation. For alleged jurisdictional violations, notices will be mailed to the licensee and sworn statements obtained.

§376.33. Notice and Review.

If the board suspends or revokes a license or denies an applicant a license or the opportunity to be examined for a license due to the individual's prior conviction of a crime and the relationship of the crime to the license, the board shall notify the individual in writing of:

(1) the reason for the suspension, revocation, denial or disqualification;

(2) the review procedure provide in §376.27 of this title (relating to Investigations of Complaints Filed with the Board); and

(3) the earliest date the individual may appeal the ruling of the board.

§376.35. Judicial Review.

(a) An individual whose license has been suspended or revoked or who has been denied a license or the opportunity to take an examination under Chapter 371 et seq (relating to Examinations and Licensure) and who has exhausted administrative appeals may file an action in the district court in the Travis county for review of the evidence presented to the board and the decision made by the board.

(b) The petition for an action under subsection (a) of this section must be filed no later than the 30th day of the date the board's decision is final and appealable.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505992
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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CHAPTER 377. PROCEDURES GOVERNING GRIEVANCES, HEARINGS, AND APPEALS

22 TAC §§377.1 - 377.3, 377.5 - 377.12, 377.14 - 377.16, 377.19 - 377.22, 377.24, 377.27, 377.31 - 377.38, 377.41, 377.45

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§377.1 - 377.3, 377.5 - 377.12, 377.14 - 377.16, 377.19 - 377.22, 377.24, 377.27, 377.31 - 377.38, 377.41 and 377.45, concerning Procedures Governing Grievances, Hearings, and Appeals. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Rel-

ative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§377.1. Definitions.
§377.2. Scope of Rules.
§377.3. Filing of Documents.
§377.5. Agreements to be in Writing.
§377.6. Service in Nonrulemaking Proceedings.
§377.7. Conduct and Decorum.
§377.8. Classification of Parties.
§377.9. Parties in Interest.
§377.10. Appearances Personally or by Representative.
§377.11. Classification of Pleadings.
§377.12. Form and Content of Pleadings.
§377.14. Motions.
§377.15. Amendments.
§377.16. Incorporation by Reference of Board Records.
§377.19. Personal Service.
§377.20. Prehearing Conference.
§377.21. Motions for Postponement, Continuance, Withdrawal, or Dismissal of Application or Other Matters before the Board.
§377.22. Place and Nature of Hearing.
§377.24. Order of Procedure.
§377.27. Dismissal without Hearing.
§377.31. Limitation on Number of Witnesses.
§377.32. Exhibits.
§377.33. Offer of Proof.
§377.34. Depositions, Subpoenas, and Discovery.
§377.35. Proposals for Decision.
§377.36. Filing of Exceptions, Briefs, and Replies.
§377.37. Form and Content of Briefs, Exceptions, and Replies.
§377.38. Oral Argument.
§377.41. Motions for Rehearing.
§377.45. Show Cause Orders and Complaints.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505982
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
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For further information, please call: (512) 305-7000

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22 TAC §§377.1, 377.3, 377.5, 377.7, 377.9, 377.11, 377.13, 377.15, 377.17, 377.19, 377.21, 377.23, 377.25, 377.27, 377.29, 377.31, 377.33, 377.35, 377.37, 377.39, 377.41, 377.43, 377.45, 377.47, 377.49, 377.51, 377.53, 377.55, 377.57, 377.59

The Texas State Board of Podiatric Medical Examiners proposes new §§377.1, 377.3, 377.5, 377.7, 377.9, 377.11, 377.13, 377.15, 377.17, 377.19, 377.21, 377.23, 377.25, 377.27, 377.29, 377.31, 377.33, 377.35, 377.37, 377.39, 377.41, 377.43, 377.45, 377.47, 377.49, 377.51, 377.53, 377.55, 377.57 and 377.59, concerning Procedures Governing Grievances, Hearings, and Appeals. The new sections are being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year of the first five years the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Makan has also determined that for each year for the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be provisions related to the Procedures Governing Grievances, Hearings, and Appeals responsive to Sunset requirements indicating the use of appropriate alternative dispute resolution procedures in accordance with the Texas Government Code, Chapter 2009 and the use of the State Office of Administrative Hearings. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The new sections are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the laws regulating the practice of podiatry.

The proposed new sections implement the reorganization of current Chapter 377. This Chapter will remain separate but has been updated to reflect certain Sunset provisions. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. This Chapter also implements Texas Government Code, Chapter 2009 and is responsive to Texas Government Code, Chapter 2001.

§377.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) *Administrative Law Judge (ALJ)*--Person designated by the State Office of Administrative Hearings to preside over a contested case.

(2) *Applicant*--A party seeking a license or rule from the Board, or appealing any action of the Board.

(3) *Board*--The Texas State Board of Podiatric Medical Examiners.

(4) *Board member*--One of the appointed members of the decision-making body defined as the Board.

(5) *Complainant*--Any party who has filed a sworn written complaint with the Board against any party subject to the jurisdiction of the Board.

(6) *Contested case*--A proceeding, including but not restricted to licensing, in which the legal rights, duties or privileges of a party are to be determined by the Board after an opportunity for adjudicative hearing.

(7) *Intervenor*--Any party to a grievance, hearing, or appeal otherwise not defined.

(8) *License*--Includes the whole or part of any Board approval, registration, or similar form of permission required by law.

(9) *Licensing*--Includes the Board process respecting the granting, denial, renewal, revocation, cancellation, suspension, annulment, withdrawal, limitation, or amendment of a license.

(10) *Party*--Each person or agency named or admitted as a party to a complaint, grievance, hearing, or appeal.

(11) *Person*--Any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than a State of Texas governmental agency.

(12) *Petitioner*--A party seeking a rule from the Board appealing any action of the Board, or a contested case before SOAH.

(13) *Pleading*--Written allegations filed by parties concerning their respective claims.

(14) *Protestant*--Any party opposing an application or petition filed with the Board.

(15) *Respondent*--Any party against whom any complaint has been filed or a party who responds to a Petitioner's original petition or pleading.

§377.3. Scope of Rules.

These rules shall govern the procedure for the institution, conduct, and determination of all cases and proceedings before SOAH or the Board. They shall not be construed so as to enlarge, diminish, modify, or alter the jurisdiction, powers, or authority of the Board or the substantive rights of any person. To the extent that a rule contained in this chapter conflicts with or does not address a matter covered by a SOAH rule, the SOAH rule shall govern all matters and proceedings before SOAH.

§377.5. Filing of Documents.

(a) All applications, petitions, complaints, motions, protests, replies, answers, notices, and other pleadings relating to any proceeding pending or to be instituted before the Board, except for SOAH-related proceedings, shall be filed with the Executive Director or other designated person. They shall be deemed filed only when actually received, accompanied by the filing fee, if any, required by statute or Board rules.

(b) A copy of all documents filed with the State Office of Administrative Hearings shall be sent to the Board's legal representative, or if a legal representative has not been identified, then to the Board office, addressed to the Executive Director.

(c) Unless otherwise provided by statute, the time for filing any pleading, except a notice of protest, may be extended by order of the Executive Director or the Administrative Law Judge, as appropriate, upon written motion duly filed prior to the expiration of the applicable period of time for the filing of the same, showing that there is good cause for such extension of time and that the need, therefore, is not caused by the neglect, indifference, or lack of diligence of the movant. A copy of any such motion shall be service by the party filing same upon all other parties of record to the proceeding, contemporaneously with the filing thereof.

§377.7. Agreements to be in Writing.

No stipulation or agreement between the parties, their attorneys, or representatives with regard to any matter involved in any proceeding before the Board or SOAH shall be enforced unless it shall have been reduced to writing and signed by the parties or their authorized representatives, or unless it shall have been dictated into the record by them during the course of a hearing, or incorporated in an order bearing their written approval. This section does not limit a party's ability to waive, modify, or stipulate any right or privilege afforded by these rules, unless precluded by law.

§377.9. Service in Nonrulemaking Proceedings.

(a) *Personal Service.* Where personal service of notice by the Board is required, the Board shall mail the same, by certified return receipt requested mail, to the last known place of address or the last address supplied to the Board of the person entitled to receive such notice.

(b) *Service of Pleadings.* A copy of any protest, reply, answer, motion, or other pleading filed by any party in any proceeding subsequent to the institution thereof shall be mailed or otherwise delivered by the party filing the same to every other party of record. If any party has appeared in the proceeding by attorney or other representative authorized under these rules to make appearances, service shall be made upon such representative. The willful failure of any party to make such service shall be sufficient grounds for the entry of an order by the Board or an Administrative Law Judge striking the protest, reply, answer, motion, or other pleading from the record.

(c) *Certificate of Service.* A certificate by the party, attorney, or representative who files a pleading, stating that it has been served on

the other parties, shall be *prima facie* evidence of such service. The following form of certificate will be sufficient in this connection: I hereby certify that I have this ____ day of _____, 20__, served copies of the foregoing pleading upon all other parties to this proceeding, by (here state the manner of service, name, address, phone number and fax number of every party being served). Signature.

§377.11. Conduct and Decorum.

Every party, witness, attorney, or other representative shall comport himself in all proceedings with proper dignity, courtesy, and respect for the Board, the Administrative Law Judge, the Board member(s), and each other party, witness, attorney, and representative. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the Texas State Bar.

§377.13. Classification of Parties.

Parties to proceedings before the Board are applicants, protestants, petitioners, complainants, respondents, and intervenors. Regardless of errors as the designations in their pleadings, the parties shall be accorded their true status in the proceeding.

§377.15. Parties in Interest.

Any party in interest may appear in any proceeding before the Board. All appearances shall be subject to a motion to strike upon showing that the party has no justifiable or administratively cognizable interest in the proceeding.

§377.17. Appearance Personally or by Representative.

Any party may appear and be represented by an attorney at law authorized to practice law in Texas. Any person may appear on his own behalf. A corporation, partnership, or association may appear and be represented by one of the following: any officer, partner, or full-time employee.

§377.19. Classification of Pleadings.

Pleadings filed with the Board shall be complaints, applications, petitions, answers, replies, motions for rehearing, appeals, and other motions. Regardless of any error in the designation of a pleading, it shall be accorded its true status in the proceeding in which it is filed.

§377.21. Form and Content of Pleadings.

(a) *Typewritten or Printed*. Pleadings shall be typewritten or printed upon paper 8 1/2 by 11 inches with a left-hand margin at least 1 inch wide and exhibits annexed thereto shall be folded to the same size. Reproductions are acceptable, provided all copies are clear and permanently legible and are certified as true and correct copies.

(b) *Content*. Pleadings shall state their object, shall contain a concise statement of facts in support of the same, and shall be signed by the applicant or his authorized agent.

(c) *Signature and Address*. The original of every pleading shall be signed in ink by the party filing the paper or by his authorized representative. Pleadings shall contain the address of the party filing the document or the name, telephone number, and business address of the representative.

(d) *Pleadings*. All pleadings for which no official form is prescribed shall contain:

(1) the name of the party seeking to bring about or prevent action by the Board;

(2) the names of all other known parties in interest;

(3) a concise statement of the facts relied upon by the pleader;

(4) a prayer stating the type of relief, action, or order desired by the pleader;

(5) any other matter required by statute; and

(6) a certificate of service, as required by §377.9(b) of this title (relating to Service in Nonrulemaking Proceedings).

(e) *Filing fees*. Each application, petition, or complaint which is intended to institute a proceeding before the Board shall be accompanied by the filing fee, prescribed by law or these rules.

§377.23. Motions.

Any motion relating to a pending proceeding shall, unless made during a hearing, be written and shall set forth the relief sought and the specific reasons and grounds therefore. If based upon matters which do not appear of record, it shall be supported by affidavit. Any motion not made during a hearing shall be filed with SOAH. The Administrative Law Judge shall at the request of a party or on the court's own motion conduct a hearing on the motion and shall act upon the motion at the earliest practicable time. If neither party requests a hearing on the motion on or before the date the reply to the motion is due, the Administrative Law Judge may choose to not act on the motion.

§377.25. Amendments.

Any pleading may be amended up to seven days prior to the hearing thereon or to the contested case hearing, provided that the application, complaint, or petition upon which notice has been issued shall not be amended so as to broaden the scope thereof or unreasonably delay the hearing.

§377.27. Incorporation by Reference of Board Records.

Any pleading may adopt and incorporate, by specific reference thereto, any part of any document or entry in the official files and records of the Board. This rule shall not relieve any applicant of the necessity of alleging in detail, if required, facts necessary to sustain his burden of proof imposed by law.

§377.29. Personal Service.

All notices of which personal service is required by law shall be addressed to the person entitled thereto, and shall set forth the names of all other parties, the nature and subject matter of the proceeding, the time and place of hearing, and any other matter required by law.

§377.31. Prehearing Conference.

(a) In any proceeding, the Board or the ALJ, as applicable, on its own motion or the motion of a party, may direct the parties, their attorneys, or representatives to appear before the Board or the ALJ at a specified time and place for a conference prior to the hearing for the purpose of formulating issues and considering:

(1) the simplification of issues;

(2) the possibility of making admissions of certain averments of fact or stipulations concerning the use by either or both parties of matters of public record, such as annual reports, to the end of avoiding the unnecessary introduction of proof;

(3) the procedure at a hearing;

(4) the limitation, where possible, of the number of witnesses; and

(5) such other matters as may aid in the simplification of the proceedings, and the disposition of the matters in controversy, including settlements of such issues as in dispute.

(b) Unless precluded by law, informal dispositions may be made of any contested case by stipulation, agreed settlement, or consent order of default.

(c) Action taken at the conference shall be recorded in an appropriate order by the Board or the ALJ, unless the parties enter into a written agreement approved by the Board or the ALJ.

§377.33. Motions for Postponement, Continuance, Withdrawal, or Dismissal of Application or Other Matters before SOAH or the Board.

Motions for postponement, continuance, withdrawal, or dismissal of applications or other matters which have been duly set for hearing shall be in writing, shall be filed with the Board or the ALJ, and distributed to all interested parties, over a certificate of service, not less than five days prior to the date designated for the matter to be heard. Such motion shall set forth, under oath, the specific grounds upon which the moving party seeks such actions and shall make reference to all prior motions of the same nature filed in the same proceeding. Failure to comply with the above, except for good cause shown, may be construed as lack of diligence on the part of the moving party, and at the discretion of the Board or ALJ, may result in the dismissal of the application or other matter in issue, with prejudice to refiling. Once an application or other matter has actually proceeded to a hearing, pursuant to the notice issued thereon, no postponement or continuance shall be granted without the consent of all parties involved, unless the Board or the ALJ, as appropriate shall have ordered such postponement or continuance.

§377.35. Place and Nature of Hearing.

All hearings conducted in any proceeding shall be open to the public unless otherwise required by law. Hearings will be held at places designated by the Board or SOAH, as applicable.

§377.37. Order of Procedure.

(a) In all proceedings the petitioner, applicant, or complainant, as applicable, shall be entitled to open and close. The Board or the ALJ, as applicable, shall determine at what stage in the proceeding intervenors shall be permitted to offer evidence, if any. After all parties have completed the presentation of their evidence, the Board or the ALJ, as applicable, may call upon any party or the staff of the Board for further material or relevant evidence upon any issue, to be presented at a future hearing after notice to all parties of record, which notice may be announced during such hearing.

(b) The Board or the ALJ, as applicable shall direct all parties to enter their appearances on the record. If exceptions to the form or sufficiency of a pleading have been filed in writing at least three days prior to the date of the hearing, they shall be heard; otherwise not. If exceptions are sustained, amended pleadings shall be filed in accordance with the ALJ's order prior to the commencement of the hearing, subject to the provisions of §377.25 of this title (relating to Amendments).

§377.39. Dismissal without Hearing.

The SOAH rules 1 TAC §155.57 regarding summary disposition shall apply to summary disposition of a case without hearing by the Board or the ALJ, as applicable.

§377.41. Limitation on Number of Witnesses.

The Board or the ALJ, as applicable, shall have the right in any proceeding to limit the number of witnesses whose testimony is merely cumulative.

§377.43. Exhibits.

(a) *Form*. Exhibits of documentary character shall be of such size, as set forth in §377.21 of this title (relating to Form and Content of Pleadings), as not to unduly encumber the files and records of the Board. There shall be a brief statement of the first sheet of the exhibit of what the exhibit purports to show. Exhibits shall be limited to facts material and relevant to the issues involved in a particular proceeding.

(b) *Tender and Service*. The original of each exhibit offered shall be tendered to the reporter for identification; one copy shall be furnished to the ALJ, and one copy to each other party of record or his attorney or representative.

(c) *After Hearing*. Unless specifically directed by the Board or the ALJ, no exhibit will be permitted to be filed in any proceeding after the conclusion of the hearing. In the event the Board allows an exhibit to be filed after the conclusion of the hearing, copies of the late-filed exhibit shall be served on all parties of record.

§377.45. Offer of Proof.

When testimony is excluded by ruling of the ALJ, the party offering such evidence shall be permitted to make an offer of proof by dictating or submitting in writing the substance of the proposed testimony, prior to the conclusion of the hearing, and such offer of proof shall be sufficient to preserve the point for review. The ALJ may ask such questions of the witness as is necessary to determine whether the witness would testify as represented in the offer of proof. An alleged error in sustaining an objection to questions asked on cross-examination may be preserved without making an offer of proof.

§377.47. Depositions, Subpoenas, and Discovery.

The taking of depositions, subpoenas, and discovery shall not be permitted except in contested case hearings or as required by law.

§377.49. Proposals for Decision.

When a proposal for decision is issued, a copy of the proposal shall be service forthwith on each party or his attorney of record. Upon the expiration of the 20th day following issuance of the Proposal for Decision, the proposal for decision may be adopted by written order of the Board, unless exceptions and briefs shall have been filed in the manner required in §377.51 of this title (relating to Filing of Exceptions, Briefs, and Replies).

§377.51. Filing of Exceptions, Briefs, and Replies.

Any party of record may, within 20 days after the date of the issuance of a proposal for decision, file exceptions and briefs to the proposal for decision, and replies to such exceptions and briefs may be filed within 15 days after the deadline for filing of such exceptions and briefs. A request for extension of time within which to file exceptions, briefs, or replies shall be filed with the ALJ, and a copy thereof shall be served on all other parties of record by the party making such request. The ALJ shall promptly notify the parties of his action upon the same and shall allow additional time only in extraordinary circumstances where the interest of justice so requires.

§377.53. Form and Content of Briefs, Exceptions, and Replies.

Briefs, exceptions, and replies shall be of such size and conform, as near as possible to the form of pleadings as set forth in §377.21(a) and (c) of this title (relating to Form and Content of Pleadings). The points involved shall be concisely stated. The evidence in support of each point shall be abstracted or summarized, and/or briefly stated in the form of proposed findings of fact. Complete citations to the page number of the record or exhibit referring to evidence shall be made. The specific purpose for which the evidence is relied upon shall be stated. The argument and authorities shall be organized and directed to each point properly proposed as a finding of fact in a concise and logical manner. Briefs shall contain a table of contents and authorities. Briefs may be filed prior to the issuance of a proposal for decision only when requested or permitted by the ALJ.

§377.55. Oral Argument.

Any party may request oral argument to be presented to the Board at the meeting scheduled for final determination of the party's case, but oral argument shall be allowed only in the sound discretion of the Board. A request for oral argument may be incorporated in exceptions, briefs, replies to exceptions, motions for rehearing, or in separate pleadings.

§377.57. Motions for Rehearing.

A motion for rehearing is a prerequisite to an appeal. A motion for rehearing must be filed within 15 days after the date a final decision or order is issued. Replies to a motion for rehearing must be filed with the Board within 25 days after the date the final decision or order is issued. If Board action is not taken within the 45-day period after the final decision or order is issued, the motion for rehearing is overruled by operation of law. The Board may, by written order, extend the period of time for filing the motions and replies and for taking Board action, except that an extension may not extend the period for Board action beyond 90 days after the date the final decision or order is issued. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date of the final decision or order. The parties may by agreement, with the approval of the Board, provide for a modification of the times provided in this section.

§377.59. Show Cause Orders and Complaints.

The Board, either on its own motion or upon receipt of sufficient written complaint, may, in its sound discretion, at any time after notice to all interested parties, including personal service upon the licensee, cite any person operating under its jurisdiction to appear before SOAH in a public hearing and require him/her to show cause why his/her license or certificate or other authority should not be revoked, cancelled, suspended, limited, amended, or why such person should not be reprimanded or censored, or why such other action available to the Board not be taken, for the failure to comply with any applicable statute, or the rules, orders of the Board, or for the failure to abide by the terms and provisions of the license. All hearings in such proceedings shall be conducted by SOAH in accordance with the provisions of these rules.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505993
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
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For further information, please call: (512) 305-7000

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CHAPTER 378. CONTINUING EDUCATION

22 TAC §§378.1 - 378.3, 378.5 - 378.8

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§378.1 - 378.3 and §§378.5 - 378.8, concerning Continuing Education. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§378.1. Continuing Education Required.
§378.2. Exceptions and Allowances.
§378.3. Method of Approval of Hours.
§378.5. Records.
§378.6. Certification.
§378.7. Violations.
§378.8. Inactive License Status.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
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For further information, please call: (512) 305-7000

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CHAPTER 378. CONTINUING EDUCATION AND LICENSE RENEWAL

22 TAC §§378.1, 378.3, 378.5, 378.7, 378.9, 378.11, 378.13

The Texas State Board of Podiatric Medical Examiners proposes new §§378.1, 378.3, 378.5, 378.7, 378.9, 378.11, and 378.13, concerning Continuing Education and License Renewal. The new sections are being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year of the first five years the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Makan has also determined that for each year for the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to ensure that podiatric physicians maintain current medical education by continually updating their skills to reflect current standards of care. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The new sections are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the laws regulating the practice of podiatry.

The proposed new sections implement the reorganization of current Chapter 378. This Chapter will remain separate but has been updated to reflect rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§378.1. Continuing Education Requirement.

(a) Each person licensed to practice podiatric medicine in the State of Texas is required to have 30 hours of continuing education every two years for the renewal of the license to practice podiatric medicine. Two hours of the required 30 hours of annual continuing education (CME) may be a course, class, seminar, or workshop in Ethics. It shall be the responsibility of the podiatric physician to ensure that all CME hours being claimed to satisfy the 30-hour bi-annual requirement meet the standards for CME as set by the Board. One hour of CME is defined as a typical fifty-minute classroom instructional session or its equivalent. Practice management, home study and self study programs will be accepted for CME credit hours only if the program is sponsored by the APMA, or the Council for Podiatric Medical Education. The licensee may obtain up to, but not exceed 10 hours of these types of hours per biennium.

(b) A licensee shall receive 100% credit for each hour of training (one hour of training equals one hour of CME) for podiatric medical meetings and training sponsored by APMA, APMA affiliated organizations, TPMA, state, county or regional podiatric medical association podiatric medical meetings, university sponsored podiatric medical meetings, hospital podiatric medical meetings or hospital podiatric medical grand rounds, medical meetings sponsored by the Foot & Ankle Society or the orthopedic community relating to foot care, and others at the discretion of the Board. If a podiatric physician gives a lecture, he/she can receive the same CME credit that a podiatrist attending the lecture obtains.

(c) Cardiopulmonary Resuscitation (CPR) certification is eligible for up to three hours of CME credit and Advanced Cardiac Life Support (ACLS) certification for up to six hours of CME credit (credit can only be obtained for one, not both). No on-line CPR certification will be accepted for CME credit. Contact courses only will be given CME credit.

(d) If a podiatric physician has an article published (not just submitted) in a peer review journal, (s)he may receive one hour of CME credit for the article, with credit for the article being provided only once, regardless of the number of times or the number of journals in which the article is published.

(e) A licensee shall receive 50% credit for each hour of training (one hour of training equals one half hour of CME) for non-podiatric medical sponsored meetings that are relative to podiatric medicine. The yardstick used to determine whether the training is "relative" to podiatric medicine is: "will the training enhance the knowledge and abilities of the podiatric physician in terms of improved quality and delivery of patient care?" Fifty percent credit shall also be assigned to hospital grand rounds, hospital CME programs, corporate sponsored meetings, and meetings sponsored by the American Medical Association, the orthopedic community, the American Diabetes Association, the Nursing Association, the Physical Therapy Association, and others at the discretion of the Board.

(f) Attendance in a mandatory Podiatric Medical Reviewer initial training course will receive credit for four CME hours.

(g) Podiatric Medical Reviewers will receive one CME hour per case reviewed. A maximum of four CME hours per biennium are allowed for case reviews.

(h) These hours of continuing education must be obtained in the 24-month period immediately preceding the year for which the license was issued. The two-year period will begin on November 1 and end on October 31 two years later. The year in which the 30-hour credit requirement must be completed after the original license is issued is every odd-numbered year if the original license was issued in an odd-numbered year and is every even-numbered year if the original license was issued in an even-numbered year. A licensee who completes

more than the required 30 hours during the preceding CME period may carry forward a maximum of 10 hours for the next CME period.

(i) Documentation of CME courses shall be made available to the Board upon request, but should not be sent to the Board via facsimile, or mailed with the annual license renewal form. Each licensee shall maintain the licensee's CME records at the licensee's practice location for four years, evidencing completion of the CME programs completed by the licensee. The Board shall conduct random checks of licensee CME documentation to ensure compliance with this rule.

(j) A percentage of podiatric physicians who renew their licenses will be required to produce proof of completion of the CME hours they affirmed obtaining on their annual license renewal notice. The licensees to be reviewed will be chosen randomly out of the pool of annual license renewal forms. Once a licensee has been randomly chosen for the CME audit, he/she will receive a letter requiring the licensee to submit to the Board proof of the hours claimed on the annual renewal form. Original documents will not be required; copies of certificates and forms will be sufficient.

(k) If the licensee does not comply with the request for CME documentation within 30 days of receipt of the letter, or if the licensee is unable to provide proof of the hours claimed on the annual renewal form, the licensee will be investigated by the Board. If the investigation reveals that the requirement was not met, the licensee may be disciplined. The penalty for non-compliance with the bi-annual CME requirement shall be a letter of reprimand and/or an administrative penalty per violation up to the maximum allowed by law.

(l) Licensees that are deficient in CME hours must complete all deficient CME hours and present year CME requirement in order to maintain licensure.

(m) The Board may assess the continuing education needs of a licensee and require the licensee to attend continuing education courses specified by the Board.

(n) Continuing education obtained as a part of a disciplinary action is not acceptable credit towards the total of 30 hours required every two years.

§378.3. Exceptions and Allowances.

(a) Delinquency for continuing education may be allowed in cases of hardship as determined on an individual basis by the Texas State Board of Podiatric Medical Examiners. In cases of such hardships, hours of delinquency must be current at the end of a three-year period.

(b) Any practitioner not actively practicing podiatric medicine shall be exempt from these requirements; however, upon resuming practice of podiatric medicine, that person shall fulfill the requirements of the preceding year from the effective date prior to his resumption of practice.

(c) All cases not covered by the above shall be considered individually by the Board for continuing education.

§378.5. Method of Approval of Hours.

(a) Any program approved by the Council of Podiatric Medical Education of the American Podiatric Medical Association may be approved by the Texas State Board of Podiatric Medical Examiners.

(b) Hours obtained in Colleges or Universities while working on a degreed or non-degreed program or an approved residency program by the Council on Education and providing these courses shall be of a medical nature, shall be considered as having fulfilled the requirements of continuing education hours for the fiscal year.

(c) Hours of continuing education submitted to the State Board for approval, by any member, must be certified by the Continuing Education Director of the institution or organization from which the hours were obtained, that he/she was in actual attendance for the specified period.

(d) Holders of current Cardio-Pulmonary Resuscitation certificates are eligible for three hours credit of continuing education or, current Advance Life Support Course certificates are eligible for six hours credit of continuing education.

§378.7. Certification.

Texas State Board of Podiatric Medical Examiners or whoever it designates will approve all continuing medical education (CME) credits.

§378.9. Violations.

Any podiatric physician who violates sections in this chapter are hereby subject to revocation, probation, cancellation and/or suspension of their podiatric physicians' license as provided by Texas Occupations Code §202.501(a).

§378.11. Inactive License Status.

(a) A licensee may place a license on inactive status by applying for inactive status on a form prescribed by the Board before the date of the expiration of the license and by complying with all license renewal requirements other than the continuing education requirements.

(b) A holder of a license that is on inactive status may not practice podiatric medicine in this state. The practice of podiatric medicine by a holder of a license that is on inactive status constitutes the practice of podiatric medicine without a license.

(c) A licensee may remain on inactive status for four years. In order for a licensee to return to active status, the licensee must complete 15 hours of continuing education per year of inactive status not to exceed four years in addition to any outstanding hours of continuing education and pay the required renewal license fees prior to the expiration of the four years. If licensee does not return to active status prior to the expiration of four years, the license is delinquent and the licensee must pay a late renewal penalty in addition to the requirements for returning to active status.

§378.13. License Renewal.

(a) A person may renew his unexpired license by paying to the Board before the expiration date of the license the required renewal fee. A license to practice podiatric medicine expires on October 31 of each year. To be eligible to renew the license, a licensee must comply with the continuing education requirements prescribed by the Board.

(b) If a person's license has been expired for 90 days or less, the person may renew the license by paying to the Board a fee equal to 1-1/2 times the required renewal fee.

(c) If a person's license has been expired for more than 90 days but less than one year, the person may renew the license by paying to the Board all unpaid renewal fees and a fee that is equal to two times the required renewal fee.

(d) If a person's license has been expired for one year or longer, the person may not renew the license. The license is considered to have been cancelled. The person may obtain a new license by submitting to reexamination and complying with the requirements and procedures for obtaining an original license. The Board may renew without reexamination an expired license of a person who was licensed in this state, moved to another state, and is currently licensed and has been in practice in the other state for the two years preceding application. The person must complete an application prescribed by

the Board and pay to the Board a fee that is equal to the examination fee for the license.

(e) The annual renewal application and/or postcard notice will be deemed to be written notice of the impending license expiration forwarded to the person at the person's last known address according to the records of the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
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CHAPTER 379. FEES AND RENEWAL

22 TAC §379.1, §379.2

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §379.1 and §379.2, concerning Fees and Renewal. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§379.1. Fees.

§379.2. License Renewal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
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For further information, please call: (512) 305-7000

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CHAPTER 380. HYPERBARIC OXYGEN GUIDELINES

22 TAC §380.1

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §380.1, concerning Hyperbaric Oxygen Guidelines. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of

processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the section is repealed, there will be no fiscal implications for state or local government as a result of repealing the section.

Mr. Makan has also determined that for each year for the first five years the section is repealed, the public benefit anticipated as a result of repealing the rule will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the section as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§380.1. Hyperbaric Oxygen Guidelines.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

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Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
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For further information, please call: (512) 305-7000

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CHAPTER 381. RELATIVE ANALGESIA

22 TAC §§381.1 - 381.8

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§381.1 - 381.8, concerning Relative Analgesia. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§381.1. Relative Analgesia Nitrous Oxide/Oxygen Inhalation Conscious Sedation.

§381.2. Direct Supervision.

§381.3. Equipment Safety Criteria.

§381.4. Office Safety Equipment and Medical Supplies.

§381.5. Nitrous Oxide/Oxygen Inhalation Conscious Sedation Permit.

§381.6. Nitrous Oxide/Oxygen Inhalation Conscious Sedation Permit Requirements.

§381.7. Auxiliary Personnel.

§381.8. Pre-operative Evaluation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505986
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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CHAPTER 382. PODIATRIC MEDICAL TECHNICIANS

22 TAC §§382.1 - 382.6

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§382.1 - 382.6, concerning Podiatric Medical Technicians. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chapter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§382.1. Purpose.

§382.2. Definitions.

§382.3. Registration.

§382.4. Non-Certified Podiatric Technician's Scope of Practice.

§382.5. Annual Renewal.

§382.6. Suspension, Revocation, or Non-renewal of Registration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505987
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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CHAPTER 382. RADIOLOGIC TECHNOLOGISTS

22 TAC §§382.1, 382.3, 382.5, 382.7, 382.9, 382.11

The Texas State Board of Podiatric Medical Examiners proposes new §§382.1, 382.3, 382.5, 382.7, 382.9 and 382.11, concerning Radiologic Technologists. The new sections are being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. Section 382.9 decreases the penalty timeframe from one to ninety days to one to thirty days and also changes the penalty fee from $5.00 to $25.00.

Hemant Makan, Executive Director, has determined that for each year of the first five years the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Makan has also determined that for each year for the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to ensure the completion of requisite education, and to compel the proper and timely registration of those persons in a podiatrist's office who perform radiological procedures. There will be no effect on small businesses, micro-businesses, or individuals. However, the registrants who fail to renew by the deadline will be assessed the additional $20 penalty fee.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The new sections are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the laws regulating the practice of podiatry.

The proposed new sections implement the reorganization of current Chapter 382. Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists." This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006. This reorganization also implements Texas Occupations Code, Chapter 601 *et seq.*

§382.1. Purpose.

The purpose of these rules is to implement the provisions of the Medical Radiologic Technologist Certification Act, Texas Civil Statutes, Article 4512m, applicable to non-certified radiologic technicians or non-certified technicians.

§382.3. Definitions.

The following words or terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) *Board*--The Texas State Board of Podiatric Medical Examiners

(2) *CME*--Continuing medical education

(3) *Non-certified podiatric medical technician or registrant*--A person who:

(A) has completed a training program approved by the Texas Department of State Health Services and the Board by January 1, 1998; however, if the person is employed after January 1, 1998, the training program approved by the TDSHS and the Board shall be completed prior to the person performing podiatric radiological procedures for any podiatric medical purpose;

(B) is registered with the Board.

(4) *Supervision*--Responsibility for the control of quality, radiation safety and protection, and technical aspects of the application of ionizing radiation to the foot and ankle for production of standard radiographs utilized in podiatric medicine for diagnostic purposes.

(5) *TDSHS*--Texas Department of State Health Services.

(6) *TRCR*--Texas Regulations for Control of Radiation, 25 TAC Chapter 289. The regulations are available from the Radiation Group. Policy, Standards/QA Unit, Environmental and Consumer Safety Section, Division of Regulatory Services, TDSHS or from the Board office.

§382.5. Registration.

(a) Any person performing podiatric radiological procedures as defined in §382.7 of this title (relating to Non-Certified Podiatric Technician's Scope of Practice), under the supervision of a licensed Texas podiatric physician must be registered with the Board.

(b) This section does not apply to persons certified by TDSHS under the Medical Radiologic Technologist Certification Act.

(c) An applicant shall make application for registration with the Board, which includes a list of the applicants' supervising podiatric physician(s). Multiple podiatric physicians may be listed on a single application form. Each podiatric physician will have equal rights and responsibility to supervise a particular non-certified podiatric medical technician.

(d) Applicant shall:

(1) Receive training and instruction as set out in 25 TAC §143.17 (relating to Mandatory Training Programs for Non-Certified Technicians) and/or 25 TAC §143.20 (relating to alternate Training Requirements). Proof of successful completion of mandatory training must be provided (copy of certificate) to the Board upon application; and

(2) be 18 years of age or older.

(e) Applicant must pay appropriate fee established by the Board as defined in §371.3 of this title (relating to Fees) at the time of application.

§382.7. Non-Certified Podiatric Technician's Scope of Practice.

(a) A registrant may perform only foot and ankle radiological procedures utilizing standard film or film screen in combinations and radiographic equipment designed for foot and ankle radiological procedures for the practice of podiatric medicine.

(b) A registrant shall perform radiological procedures only under the supervision of a podiatric physician physically present on the premises.

(c) All registrants must comply with the safety rules of the TDSHS relating to the control of radiation as set forth in that department's document titled, "Texas Regulations for Control of Radiation."

§382.9. Annual Renewal.

(a) Registrants shall renew the registration annually by submitting a registration application, paying a fee, as specified by the Board, to the Board by cashier's check or money order.

(b) If the annual registration fee and proof of mandatory CME (copy of certificate) is not received on or prior to the expiration date of the registration, the following penalty will be imposed.

(1) one (1) to thirty (30) days late--$25.00 plus the annual registration fee;

(2) over thirty (30) days late--registration may not be renewed. The person may obtain a new registration by complying with the requirements and procedures for obtaining an original certification.

(c) Registrants shall inform the Board of any address change or change of supervising podiatric physician within two (2) weeks.

§382.11. Suspension, Revocation, or Non-renewal of Registration.

(a) The Board may refuse to issue or renew a registration to an applicant and may take any disciplinary action against a non-certified podiatric medical technician who:

(1) violates the Podiatric Medical Practice Act, the Rules of the Board, an order of the Board previously entered in a disciplinary proceeding, or an order to comply with a subpoena issued by the Board;

(2) violates the Medical Radiologic Technologist Certification Act, or the Rules promulgated by the TDSHS;

(3) violates the Rules of the TDSHS for Control of Radiation;

(4) obtains, attempts to obtain, or uses a registration by bribery or fraud;

(5) engages in unprofessional conduct, including but not limited to, conviction of a crime, commission of any act that is in violation of the laws of the State of Texas if the act is connected with provision of health care, and commission of an act or moral turpitude;

(6) develops or has an incapacity that prevents the practice of podiatric radiologic technology with reasonable skill, competence, and safety to the public as a result of:

(A) an illness;

(B) drug or alcohol dependency; or habitual use of drug or intoxicating liquors; or

(C) another physical or mental condition;

(7) fails to practice as a non-certified podiatric technician in an acceptable manner consistent with public health and welfare;

(8) has disciplinary action taken against a certification, permit, or registration as a non-certified podiatric technician in another state, or by another regulatory agency;

(9) engages in acts requiring registration under these rules without a current registration from the Board;

(10) has had a registration revoked, suspended, or has received disciplinary action.

(b) The Board may suspend, revoke, or refuse to issue or renew the registration of a non-certified podiatric technician, upon finding that a non-certified podiatric technician has committed any offense listed in this section.

(c) The applicant may seek a hearing under the Administrative Procedure Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505995
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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CHAPTER 383. SEXUAL MISCONDUCT

22 TAC §§383.1 - 383.4

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Podiatric Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Podiatric Medical Examiners proposes the repeal of §§383.1 - 383.4, concerning Sexual Misconduct. The repeal is being proposed as part of a comprehensive reorganization of the Board's rules under Title 22, Part 18, of the Texas Administrative Code to collapse similar administrative provisions otherwise currently spread out in various chapters into understandable functional chapters capturing the logical execution of processes. In addition, the proposed reorganization seeks to update the Board's rules consistent with the passage of Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

Hemant Makan, Executive Director, has determined that for each year for the first five years the sections are repealed, there will be no fiscal implications for state or local government as a result of repealing the sections.

Mr. Makan has also determined that for each year for the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be to eliminate the confusion of similar Board processes which are currently dispersed amongst various chapters by reorganizing those processes into a more understandable format. For example, advertising regulations are currently found in Chapter 373 and partly in Chap-

ter 375. The new format will collapse those regulations into one chapter, proposed Chapter 373, relating to Advertising and Practice Identification. An additional example is with regard to modalities of treatment. Currently, two modalities appear in separate chapters (Hyperbaric Oxygen currently in Chapter 380 and Relative Analgesia currently in Chapter 381). The new format will collapse those modalities into one chapter, proposed Chapter 375, relating to Conduct and Scope of Practice. There will be no effect on small or micro-businesses. There are no economic costs to persons who are required to comply with the sections as repealed.

Comments on or about the proposed repeal may be submitted to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, Janie.Alonzo@foot.state.tx.us.

The repeal is proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed repeal implements the reorganization of current Chapter 379 to be merged with revised Chapter 371; current Chapter 380 to be merged with revised Chapter 375; current Chapter 381 to be merged with revised Chapter 375; Chapter 376 will remain separate but has been updated to reflect certain Sunset provisions; Chapter 382 will remain separate but with a change in heading to "Radiologic Technologists;" and current Chapter 383 to be merged with revised Chapter 375. This reorganization updates the rule language consistent with Texas Occupations Code, §§202.001, *et seq.* as amended by Senate Bill 402 pursuant to the acts of the 79th Legislature and implementation of requisite Sunset provisions effective September 1, 2005 to be adopted in rule by March 1, 2006.

§383.1. Sexual Misconduct.

§383.2. Investigation of Sexual Misconduct.

§383.3. Disciplinary Options for Sexual Misconduct.

§383.4. License Reinstatement after Sexual Misconduct.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505988
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 305-7000

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING RULES

SUBCHAPTER A. LICENSING

22 TAC §851.31

The Texas Board of Professional Geoscientists (TBPG) proposes new Chapter 851, Subchapter A, §851.31, concerning temporary licenses. The proposed rule outlines procedures for obtaining a temporary license to practice geoscience in the state. The rule would allow for someone licensed in another state to apply for a temporary license to practice in Texas for up to 90 days, and would not be renewable after the 90 days. It also allows for someone applying for a reciprocal license to practice temporarily until the determination is made on whether or not the reciprocal license will be granted. Temporary licensees would be subject to all applicable board laws and rules.

Michael D. Hess, Executive Director of the TBPG, has determined that for each year of the first five years that the section is in effect there will be no fiscal implications for state or local government as a result of enforcement or administration of this section.

Mr. Hess has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section because it should allow for an increase of geoscientific related business in this state as well as the potential for an increase in non-temporary licenses issued. A temporary licensee may choose to be licensed permanently when experiencing first-hand the benefits of being licensed in this state. There will be no economic effect on individuals, small or micro businesses.

Comments on the proposed section may be submitted in writing to Michael D. Hess, Executive Director, P.O. Box 13225, Austin, Texas 78701, (512) 936-4401. Comments may also be submitted electronically to *mhess@tbpg.state.tx.us* or faxed to (512) 936-4409. All comments must be received 30 days after publication of this rule in the *Texas Register*. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The section is proposed under the Texas Occupations Code, Chapter 1002, §1002.258, which authorizes the Board to establish conditions and fees for the issuance of a temporary license.

The proposed rule implements the Texas Occupations Code, Chapter 1002, §1002.258.

§851.31. Temporary License.

(a) The Board may issue a temporary license to an applicant described in §1002.258(a) of the Act.

(b) A temporary license holder is subject to all other rules and legal requirements to which a standard license is subject. The Board may issue a temporary license to an applicant currently licensed in another jurisdiction who seeks a license in this state and who:

(1) has held such a license in good standing as a geoscientist for at least two years in another jurisdiction, including a foreign country, that has licensing requirements substantially equivalent to the requirements of this Board or is licensed in another jurisdiction and has passed a national or other examination recognized by the Board relating to the discipline of geoscience for which licensure is being sought;

(2) submits all required forms and fees; and

(3) complies with and meets the requirements set forth in §1002.258 of the Act.

(c) Pursuant to §1002.258(c), a temporary license expires either on the 90th day after the date of issuance or on the date a reciprocal license is issued or denied, whichever event occurs first.

(d) The application fee is non-refundable.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505971
Frank Knapp
Assistant Attorney General
Texas Board of Professional Geoscientists
Proposed date of adoption: March 17, 2006
For further information, please call: (512) 936-4402

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER R. SCHOOL HEALTH ADVISORY COMMITTEE

25 TAC §37.350

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §37.350, concerning the School Health Advisory Committee (committee).

BACKGROUND AND PURPOSE

The new section complies with Senate Bill 42, 79th Legislature, 2005, (now codified in part as Health and Safety Code, §1001.0711), which requires the department to provide assistance to the State Health Services Council (council) in establishing a leadership role for the department in the support and delivery of coordinated school health programs and school health services. Government Code, §2110.008, which allows state agencies to designate a date on which the committee will automatically be abolished, and does not apply to a committee created under this section.

Senate Bill 42, 79th Legislature, 2005, establishes, a comprehensive school health education package for public primary and secondary schools. The legislation focuses on health education, physical activity, and food products. It: (1) cites proper nutrition and exercise as the focus of health for the required enrichment curriculum in kindergarten through grade 12; (2) authorizes the State Board of Education (SBOE) to adopt rules for expansion of the requirement for daily physical activity into middle school and junior high school; (3) provides for coordinated school health programs to be made available for middle schools and junior high schools; (4) holds districts accountable for the bill's requirements by requesting information on student health and physical activity information; and (5) establishes a state-level school health advisory committee.

The 76th, 77th and 78th Legislative Sessions created and modified School Health Advisory Councils (SHAC) at the school district level for the purpose of advising local school boards on coordinated school health programs, based on the needs of the individual district. Research has shown that having an active SHAC promotes district-wide coordinated school health.

The establishment of a state-level committee with a membership that reflects the broad diversity of our challenging school health issues, will add another dimension to the systematic dissemination of coordinated school health programming and school health services in Texas. The law mandates that a representative from the Texas Education Agency and the Texas Department of Agriculture serve as members of the committee. Additional appointments by the Executive Commissioner of the Health and Human Services Commission of members with a broad range of school health experience will strengthen the knowledge base of the committee. The membership nomination process will combine the Health and Human Services Commission guidelines, research-based criteria, stakeholder input, and department staff guidance.

SECTION-BY-SECTION SUMMARY

New §37.350 establishes the committee and provides procedures for its operation. Specifically, the section includes language describing how the committee shall be appointed and governed; states the applicable laws to which the committee is subject; explains the purpose of the committee; details the composition of its membership; and, outlines procedures relating to terms of membership, terms of office, attendance, staff support, parliamentary procedures, establishment of subcommittees, statements by members, reporting processes to the council and expenses reimbursement policies.

FISCAL NOTE

Casey Blass, Section Director, Disease Prevention and Intervention, has determined that for each year of the first five-year period that the section will be in effect, there will be fiscal implications to the state as a result of enforcing and administering the sections as proposed. The effect on state government will be in the form of an allocation of costs resulting from a shift of time and salaries to provide appropriate staff support for the committee. These costs are estimated to be $20,528 the first calendar year and an estimated $20,528 each year for calendar years two through five, contingent upon continuation of the committee, for three staff with the department. These figures also include estimated percentage allocations of time and salary for the Texas Department of Agriculture and Texas Department of Education representatives serving as members of the committee mandated by Health and Safety Code, §1001.0711. There is no anticipated fiscal implication for local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Blass has also determined that there will be no effect on small businesses or micro-businesses. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section as proposed. There are no anticipated economic costs to persons who are required to comply

with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of establishing the committee will be more than likely anecdotal during the first one to three years with statistical results emerging towards the end of the five-year period. The most significant outcomes, however, will be the long term effect from the results of the efforts of the committee. By that time, the original intent of the law will have become a reality and the department will be recognized as a credible, informed leader for providing support and delivery of coordinated school health programs and school health services for Texas schools. The committee will be able to study and recommend solutions to complex school health issues based on successful coordination of multi-level systems. The short and long term effect of the efforts of the state committee and the dynamic and supportive leadership of the department will have an effect on our future workforce. Recommendations by the committee will provide support for school systems, organizations, communities and consumers that have the potential to reduce childhood obesity in Texas.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed new rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Ellen Kelsey, Information Specialist, Youth-Focused Group, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7111, extension 2140 or by email to ellen.kelsey@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The new section is authorized by Health and Safety Code, §1001.0711, which requires the Health and Human Services Commission to establish this advisory committee; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new section affects the Health and Safety Code, Chapter 1001; and Government Code, Chapter 531.

§37.350. School Health Advisory Committee.

(a) The committee. The School Health Advisory Committee (committee) shall be appointed under and governed by this section. The committee is established under the Health and Safety Code, §11.016, which allows the Health and Human Services Commission (commission) to establish advisory committees.

(b) Applicable law. Government Code, §2110.008, does not apply to a committee created under this section. The committee is subject to the Health and Safety Code, §1001.0711, concerning the School Health Advisory Committee.

(c) Purpose. The purpose of the committee is to provide assistance to the State Health Services Council (council) in establishing a leadership role for the Department of State Health Services (department) in support for and delivery of coordinated school health programs and school health services.

(d) Composition.

(1) The committee shall be composed of 20 members appointed by the Executive Commissioner of the Health and Human Services Commission. The members shall consist of:

(A) one representative from the Department of Agriculture appointed by the Commissioner of Agriculture;

(B) one representative from the Texas Education Agency, appointed by the Commissioner of Education;

(C) the School Health Coordinator from the department;

(D) two individuals representing school superintendents or other school administrators; and/or school district board members;

(E) one registered nurse with school district or school health administrative nursing experience;

(F) five consumer members who are parents of school-age children with at least one parent of a child with special needs;

(G) one physician, or physician's assistant, or nurse practitioner providing health services to school aged children;

(H) one representative working in the school setting with certification in student counseling and guidance and/or safety;

(I) four members representing organizations and/or agencies involved with the health of school children;

(J) one representative working in the school setting with certification as a physical educator;

(K) one representative working in the school setting with certification as a health educator; and

(L) one representative working in the school setting as part of the district's school nutrition services.

(2) During all phases of the membership selection process, the following information will be regarded with special consideration in an effort to build a committee reflective of the current Texas popula-

tion: race, gender, age and ethnic diversity; urban, rural and suburban diversity; and, a broad statewide geographic representation whenever possible.

(e) Terms of office: The term of office of each member shall be six years. Members shall serve after expiration of their term until a replacement is appointed.

(1) Members shall be appointed for staggered terms so that the terms of a substantially equivalent number of members will expire on June 1 of each odd-numbered year beginning in 2007.

(2) If a vacancy occurs, an individual shall be appointed to serve the unexpired portion of that term.

(f) Officers. The Executive Commissioner of the Health and Human Services Commission shall appoint a presiding officer and an assistant presiding officer to begin serving on June 1 of each odd-numbered year.

(1) Each officer shall serve until May 31 of each odd-numbered year. Each officer may hold over until the Executive Commissioner of the Health and Human Services Commission appoints his or her replacement.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the Executive Commissioner of the Health and Human Services Commission. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. If the office of the presiding officer becomes vacant, the assistant presiding officer will serve until a successor is appointed to complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled temporarily by vote of the committee until the Executive Commissioner of the Health and Human Services Commission appoints a successor.

(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(g) Meetings. The committee shall meet at least twice each year.

(1) A meeting may be called by agreement of the department staff and either the presiding officer or at least three members of the committee.

(2) The department shall make meeting arrangements and shall contact committee members to determine availability for a meeting date and place.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act, Government Code, Chapter 551. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) Ten members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with a quorum present.

(7) The agenda for each committee meeting shall include an item entitled public comment under which any person will be allowed to address the committee on matters relating to committee business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(h) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent for more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(i) Staff. The department shall provide administrative support for the committee.

(j) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any committee action must be approved with a quorum present and by a majority vote of the members present.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by the department staff.

(A) A draft of the minutes approved by the presiding officer shall be provided to the council and each member of the committee within 30 days of each meeting.

(B) After approval by the committee, the minutes shall be signed by the presiding officer.

(k) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the committee to serve on subcommittees.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the committee at each of its meetings or in interim written reports as

needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(l) Statement by members.

(1) The commission, the council, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the commission, council, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the commission, the council, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(m) Reports to council. The committee shall file an annual written report to the council.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the council, the status of any rules which were recommended by the committee to the council and anticipated activities of the committee for the next year.

(2) The report shall identify the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities.

(3) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the council each June. The presiding officer and appropriate department staff shall sign it.

(n) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1) No compensatory per diem shall be paid to members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department, may not receive reimbursement for expenses from the department.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department.

(4) Each member who is to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms not later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state vouchers prepared by department staff.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 23, 2005.

TRD-200506099

Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 458-7236

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CHAPTER 38. CHILDREN WITH SPECIAL HEALTH CARE NEEDS SERVICES PROGRAM

25 TAC §§38.1 - 38.14, 38.16

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§38.1 - 38.14 and 38.16, concerning the Children with Special Health Care Needs Services Program (CSHCN Services Program).

BACKGROUND AND PURPOSE

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 38.1 - 38.14 and 38.16 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

The amendments are made in compliance with the Government Code, §2001.039, and they clarify language, make corrections of fact, make changes to grammar or syntax, and improve consistency in the rules.

SECTION-BY-SECTION SUMMARY

The following changes to names and addresses have been made throughout §§38.1 - 38.14 and 38.16. For simplicity and uniformity, the common name of the Children with Special Health Care Needs Services Program has been changed to "CSHCN Services Program." References to legacy agencies now part of the Health and Human Services Commission have been amended to reflect the department's name change from "Texas Department of Health" to "Department of State Health Services," and references to the Board of Health have been deleted. Since the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) and the Civilian Health and Medical Program of the Veterans Administration (CHAMPVA) are no longer identified by these acronyms, these programs will be identified only as "United States Department of Defense or Department of Veterans Affairs benefit plans."

The identification of the CSHCN Services Program Division Director has been changed to "the manager of the department unit having responsibility for oversight of the CSHCN Services Program." The professional designation for "master social worker-advanced clinical practitioner" has been corrected to "licensed clinical social worker (LCSW)," the current professional nomenclature. The CSHCN Services Program mailing address has been corrected. Minor textual changes to punctuation, grammar, syntax, and/or spelling have also been made.

In addition to the name and other changes identified above, amendments to §38.2 include deletion of the definitions for "advisory committee" and "board," because those entities no longer exist. The definition for "newborn screening" has been deleted, because the term is no longer used in the chapter. A definition for "commission" has been added to identify the Texas

Health and Human Services Commission. The definitions have been renumbered to reflect these additions and deletions.

The definition for "applicant" has been amended to be more comprehensive by including individuals who are seeking to establish initial or continuing eligibility as well as to re-establish lapsed eligibility.

The definition for "effective date of eligibility for applicants with spenddown" at §38.2(23)(D) has been amended to clarify that medical bills qualifying to meet "spenddown" requirements must have dates of service 12 months prior to the date of receipt of the application or within 6 months after the date eligibility was previously denied. This change is consistent with a statutory requirement that changed the eligibility period from 12 to 6 months.

The definition of "medical home" has been amended to update the definition and incorporate elements recommended by the American Academy of Pediatrics and the Medical Home Work Group of the CSHCN Services Program. In the definition of "natural home" at §38.2(34), "the eligible person" has been changed to "a person." Eligibility for the CSHCN Services Program has no bearing on this definition.

In addition to name changes identified above, the definition of "other benefit" at §38.2(36) has been amended to clarify that the intended costs of services are those "included in the scope of coverage of" the CSHCN Services Program. The phrase "but not limited to" has been incorporated in the introductory sentence before the listing of some types of "other benefits." At new §38.2(34)(B), home, auto, and other liability insurance have been added as "other benefits," and subsequent subparagraphs have been renumbered.

The definition for "specialty center" has been amended to clarify that the centers are designated for use "by CSHCN Services Program clients" as part of comprehensive services for a specific medical condition.

In addition to name and other changes identified previously, amendments to §38.3 of this title (relating to Eligibility for CSHCN Program Services) include the following. The title of the section has been changed from "Eligibility for CSHCN Program Services" to "Eligibility for Services." Section 38.3(a)(1) has been amended to clarify the requirements for a dentist or physician who certifies that a person meets the medical criteria for certification as a "child with special health care needs." The medical criteria certification must be made at least annually and must be based upon a physical examination conducted within the 12 months immediately preceding the date of certification. The certifying physician or dentist must provide not only the diagnosis code, but also the descriptor, and the section has been amended to clarify that the requirement applies to each of the person's medical conditions. These changes are consistent with current CSHCN Services Program instructions for completion of the form that supplies this documentation.

Section 38.3(a)(1) also has been amended to authorize the CSHCN Services Program Medical Director to accept written documentation of medical certification criteria from a physician or dentist licensed to practice in a state or jurisdiction of the United States other than Texas. The individual for whom the subparagraph describes medical criteria eligibility has been changed from "child/applicant" or "applicant" to "person" throughout. Section 38.3(a)(1) also has been amended to clarify that the CSHCN Services Program may not reimburse physicians or dentists for providing written documentation of medical criteria certification, and to reaffirm that only a physician or dentist who is a CSHCN Services Program participating provider may be reimbursed for services.

At §38.3(a)(2), in accordance with requirements of the 79th Texas Legislature in Regular Session (2005), Appropriations Act, DSHS Rider 63, paragraph d, compliance with financial eligibility criteria must be determined "every six months, or as directed by statutory requirements" rather than "annually." Section 38.3(2) also has been amended to delete explanations concerning net income and insurance premium payments in connection with the Children's Health Insurance Program, as they are now both inaccurate and superfluous.

Section 38.3(a)(2)(A) has been amended to make provisions concerning documentation of a family's income and relating to the length of time that financial criteria must be determined consistent with the amendments to §38.3(a)(2).

Section 38.3(a)(2)(B)(i) has been amended to clarify that the subparagraph applies to "an ongoing" client "currently not eligible for Medicaid;" to delete "medical condition" as a factor relevant to whether a client must apply to Medicaid; and to replace the reference to "Medicaid, specifically including the Medically Needy program" with "any applicable Medicaid programs."

Section 38.3(a)(2)(B)(ii) has been amended to clarify that its provisions apply to "an ongoing" client.

At §38.3(a)(3)(B), concerning health insurance coverage, the subparagraph has been amended to clarify that both Medicaid and the Children's Health Insurance Program (CHIP) are among the types of health insurance coverage for which an applicant/client must apply and remain eligible, if not exempt from such coverage. Concerning when the program may extend the deadline, the phrase "and/or continue CSHCN program coverage" has been deleted, because it is not relevant to this deadline extension. The subparagraph also has been amended to state that, if the applicant/client is eligible for "any other health insurance," the applicant/client must be enrolled. The subparagraph formerly specified only that the eligible applicant/client must be enrolled in the CHIP.

At §38.3(a)(3)(C), the paragraph has been amended to clarify that its provisions apply to "ongoing clients," and to delete the statement that a family support services plan may not be implemented until the determination of program eligibility is complete. The statement is not relevant to the determination of program eligibility requirements.

Section 38.3(a)(7)(C) has been amended to state more clearly that applicants or clients who are financially eligible for Medicaid, CHIP, or other programs with eligibility income guidelines that meet the CSHCN Services Program's income eligibility guidelines, and who also meet the CSHCN Services Program's age and residency requirements, will be considered financially eligible for the CSHCN Services Program.

Section 38.3(a)(8) has been amended to distinguish between the lengths of time for which financial and medical eligibility may be reestablished. As required by the 79th Texas Legislature in Regular Session (2005), Appropriations Act, SB1, DSHS Rider 63, paragraph (d), financial eligibility must be reestablished "every six months, or as directed by statutory requirements," rather than "at least annually." The determination of medical criteria for eligibility continues to be at least annually. Requirements concerning notification and deadlines for determination of continuing eligibility have been amended by deleting "annual," so that they are applicable to both financial or medical criteria.

In addition to name and other general changes identified previously, amendments to §38.4 of this title (relating to Covered Services) include the following. At §38.4(b)(3), the phrase "with a chronic physical or developmental condition as specified in §38.3(a)(1) of this title (relating to Eligibility for CSHCN Program Services)" has been deleted, because the term "client" is defined in §38.2 of this title (relating to Definitions).

At §38.4(b)(3)(B), the phrase "in a calendar year" has been added to specify the time period within which no more than 30 outpatient mental health service encounters may be provided.

At §38.4(b)(3)(E)(i)(II), regarding inpatient psychiatric care, the phrase "Texas Department of Mental Health and Mental Retardation programs or other" has been deleted and replaced with "public or private mental health program" as a referral resource. In addition, the specificity of the five-day limitation on care has been deleted; however, the requirement that all admissions be prior authorized remains.

Although coverage of medical foods is not a new benefit, a description of the coverage for medical foods previously stated only in program policy has been added at new §38.4(b)(3)(J). Subsequent subparagraphs have been re-alphabetized.

At §38.4(b)(3)(L)(ii), the benefit limitation of one eye examination with refraction has been clarified by stating that the benefit shall be available during "a calendar" year, rather than during "the state fiscal" year. The same limitation for one pair of non-prosthetic eyewear per year has been applied per "calendar" year at §38.4(b)(3)(L)(iii).

Also, for consistency and clarification, the home health services benefit limitations have been changed from hours per year to hours per "calendar" year at §38.4(b)(3)(Q).

Section 38.4(b)(5)(A)(i), concerning eligibility for family support services, has been deleted as redundant, and subsequent subparagraphs have been renumbered.

At §38.4(b)(5)(A)(ii), a reference to family support programs received through the Texas Department of Human Services or the Texas Department of Mental Health and Mental Retardation has been deleted and replaced with references to the Primary Home Care Program and the Medically Dependent Children's Program, as examples of other family support services programs.

At §38.4(b)(5)(A)(iii), the reference to family "support services plan" has been replaced by a family "assessment and service" plan to describe more accurately the plan that is actually developed.

Also relating to family support services, §38.4(b)(5)(B)(i) concerning the processing and evaluation of requests for family support services has been amended by adding "of clients" to describe the families for whom the subparagraph applies, and by deleting the time limit within which a family must indicate in writing the need for family support services. Families of clients may request family support services at any time.

At §38.4(b)(5)(B)(iv), the descriptor for §38.16 of this title, "(relating to Procedures to Address CSHCN Services Program Budget Alignment)," has been added.

Sections 38.4(b)(5)(C)(i) and 38.4(b)(5)(C)(vi) also have been amended to replace "written family support services" plan is with "family assessment and service" plan.

Sections 38.4(b)(5)(C)(ii)(II) and 38.4(b)(5)(C)(iii) have been amended by adding "calendar" to describe the year in which the service plan and cost allowance limitations apply.

Section 38.4(b)(5)(C)(iv)(II) has been amended to further define the term "vendor" by adding the descriptor, "enrolled as a CSHCN Services Program provider."

Section 38.4(b)(5)(D)(iii)(V) has been amended by replacing "the Texas Rehabilitation Commission" with "the Department of Assistive and Rehabilitation Services (DARS)."

Section 38.4(b)(5)(E)(ix), concerning unallowable services, has been amended to clarify that costs for allowable services must be incurred before the "requested family support service is prior authorized," rather than before the "written service plan is approved."

At §38.4(b)(5)(F)(iii), the descriptor for §38.16 of this title, "(relating to Procedures to Address CSHCN Services Program Budget Alignment)," has been added, and at §38.4(b)(5)(F)(ix), the "written family support services" plan has been changed to the "family assessment and service" plan.

Section 38.4(b)(6)(B), concerning the CSHCN Services Program transportation benefit, has been amended to clarify that the benefit may include transportation "to" as well as "from" the nearest medically appropriate facility. Further description of the facility and benefit has been added by the phrase, "(in Texas or in the United States 50 or fewer miles from the Texas border) to obtain medically necessary and appropriate health care services that are within the scope of the coverage of the CSHCN Services Program and are provided by a CSHCN Services Program enrolled provider." The section also has been clarified by adding that transportation to services available more than 50 miles from the Texas border will not be approved, except as specified in §38.6(e) of this title (relating to Providers).

At §38.4(b)(6)(C), new language clarifies that the benefit for meals and lodging must be directly related to medically necessary treatment for the client "that is provided by program enrolled providers and covered by the program." New language also provides that coverage for meals and lodging associated with travel more than 50 miles from the Texas border will not be approved, except as specified in §38.6(e) of this title (relating to Providers).

Regarding transportation of the remains of a deceased client, §38.4(b)(6)(D)(i) has been amended by replacing "while receiving CSHCN program services" with "while receiving CSHCN Services Program health care benefits," to more correctly indicate the applicable circumstances. The scope of this benefit also has been clarified by adding that such transportation is, "from the facility to the place of burial in Texas that is designated by the parent or other person legally responsible for interment."

Section 38.4(b)(6)(E), concerning payment of insurance premiums, coinsurance, co-payments, and/or deductibles, has been amended by inserting phrases to improve the specifications for payment of coinsurance and deductible amounts when the total amount paid "(including all payers)" to the provider does not exceed the maximum allowed "by the CSHCN Services Program" for the covered service.

Section 38.4(c)(5) has been amended to clarify that, although pregnancy prevention in general is not a covered service, an exception exists for the specific treatment of "a condition meeting the parameters of the 'child with special health care needs' definition."

Section 38.4(c)(6) has been amended to further define the scope of the exclusion of "maternity care" as a covered service by addition of the description, "services specific to routine pregnancy care, labor and delivery, and maternal post-partum care."

Section 38.4(c)(7) has been amended to clarify that infertility treatment or other reproductive services are covered if directly related to "a condition meeting the parameters of the 'child with special health care needs' definition."

Section 38.4(d)(2) has been amended to clarify that requests for authorization of certain services must be submitted prior to the date of service.

Section 38.4(d)(4) has been deleted as repetitive, and the subsequent subparagraph has been renumbered.

At §38.4(d)(5), the reference to "ineligible "recipients" has been changed to "ineligible persons," and application of the term "denied authorization requests" to those "clients who do not qualify for the health care benefit requested" has been clarified.

In addition to the CSHCN Services Program name change identified previously, §38.5, relating to Rights and Responsibilities of Parents/Foster Parents/Guardian/Managing Conservator or the Adult Client, §38.5(a)(4) has been amended to include representatives of "the commission or" the department among those whom a parent/foster parent/guardian/managing conservator or the adult client may refuse entry into the home.

Section 38.6(a)(3) has been amended to clarify that providers must agree to accept the CSHCN Services Program "allowed amount of" payment "(regardless of payer)" as payment in full for services "provided to CSHCN Services Program clients." The following sentence also has been added concerning payment for services: "Providers may not request or accept payment from the client or client's family for completing any CSHCN Services Program forms."

Section 38.6(a)(4) has been amended to identify more specifically all other "public or private" benefits available to the client, including "but not limited to" Medicaid or Medicaid waiver programs, CHIP, or Medicare, "and casualty or liability coverage" prior to requesting payment from the CSHCN Services Program, which is the payer of last resort.

Section 38.6(e)(1) has been amended by adding the following phrases to clarify the scope of out-of-state coverage: 50 "or fewer" miles "from the Texas state border" and "the CSHCN Services Program may cover services that are within the scope of the program and provided by health care providers" in New Mexico, Oklahoma, Arkansas, or Louisiana located "50 or fewer miles from" the Texas state border. The last sentence of the current section has been moved and redesignated as new subparagraph 38.6(e)(4).

At §38.6(e)(2), pertaining to travel "more than" 50 miles from the Texas border, the manager of the department unit having responsibility for oversight of the CSHCN Services Program, instead of the commissioner of health, has been authorized to approve payment to out-of-state providers, and coverage has been limited to "services that are within the scope of the CSHCN Services Program and provided by health care providers located within the United States and more than 50 miles from the Texas border." The current §38.6(e)(3) has deleted and redesignated as new §38.6(e)(2)(B) stating, "the medical literature indicates that the out-of-state treatment is accepted medical practice and is anticipated to improve the client's quality of life," and subsequent subparagraphs have been renumbered.

New §38.6(e)(3) states that the out-of-state limitations do not apply to coverage or payment for selected products or devices including, but not limited to, medical foods or hearing amplification devices, which either are less costly and/or may only be available, from out-of-state sources.

Section 38.6(e)(5) has been restated to more clearly and comprehensively describe the coverage for costs of transportation and associated meals and lodging for a client and, if necessary, a responsible adult for travel to and from the location of out-of-state services that meet program approval parameters.

Changes to §38.7, relating to Ambulatory Surgical Care Facilities, include only changes to the CSHCN Services Program previously identified.

Section 38.8, relating to Inpatient Rehabilitation Centers, includes only name and minor grammatical changes identified previously, except for the amendment to §38.8(b)(8) stating that a center serving pediatric clients shall have at least one recreational area or playroom "that is bed and wheelchair accessible."

Changes to §38.9 of this title (relating to Cleft/Craniofacial Center Teams) include only changes to the name of the CSHCN Services Program and minor grammatical changes.

In addition to name and other changes identified previously, §38.10 (relating to Payment of Services) has been amended by adding the following sentence to the introductory paragraph of §38.10: "Providers may not request or accept payment from the client or the client's family for completing any CSHCN Services Program forms."

At §38.10(1)(B), the reference to ineligible "recipients" has been changed to ineligible "persons," and the definition of "denied claims" has been expanded by adding those "for clients who do not qualify for the health care benefit claimed."

Section 38.10(2), concerning claims involving health insurance coverage, CHIP or Medicaid, has been amended by stating that the CSHCN Services Program may pay covered health care benefits during a CHIP or other health insurance enrollment waiting period, and that during such periods, providers may file claims directly with the CSHCN Services Program without evidence of denial by the other insurer.

At §38.10(3)(C), "recipient" has been changed to "client."

Section 38.10(6) concerning CSHCN Services Program fee schedules, has been amended by adding, simplifying, or correcting reimbursement or pricing methodologies to reflect current practice. The amendments do not represent increases or decreases in reimbursement to individual provider types. In many instances, the phrase, "the lower of the billed amount or the maximum amount allowed by the Texas Medicaid Program," replaces more detailed language that describes the way(s) in which the Medicaid maximum reimbursement amounts were derived.

At new §38.10(6)(G), a pricing methodology has been added for medical foods, which is the lower of the billed amount, the manufacturer's suggested retail price, or the maximum charge allowed by the Texas Medicaid program up to a maximum of $200 per client per month. Subsequent subparagraphs have been re-alphabetized throughout the section.

At §38.10(6)(H), the methodology for expendable medical supplies has been changed to the lower of the billed amount or the maximum amount allowed by the Texas Medicaid program.

At §38.10(6)(I), current language has been deleted and new language concerning the reimbursement methodology for durable medical equipment has been added to improve accuracy and to reflect current program practice. The penalty for delayed delivery has been deleted.

The reimbursement methodology for orthotics and prosthetics, formerly §38.10(6)(I)(iii), has been redesignated as §38.10(6)(K), and subsequent subparagraphs have been re-alphabetized.

At new §38.10(6)(M), the limitation for home health nursing services has been clarified by adding "calendar" to describe the maximum allowable number of hours per year.

At new §38.10(6)(O), the state reimbursement methodology for audiological testing and amplification devices has been changed to the lower of the billed amount or the amount allowed by the Program for Amplification for Children of Texas (PACT).

At new §38.10(6)(U), "Centers for Medicare and Medicaid Services" has been substituted for the abbreviation "CMS."

At new §38.10(6)(X), the reimbursement methodology for independent laboratory services has been changed to the lower of the billed amount or the maximum allowed by the Texas Medicaid program.

At new §38.10(6)(AA), the reimbursement methodology for vision services has been amended to add an exception for high-powered lenses.

Section 38.11 of this title (relating to Contracts, Written Agreements, and Donations) includes no amendments other than name and general grammatical changes described previously.

Section 38.12 of this title (relating to Denial/Modification/Suspension/Termination of Eligibility for Health Care Benefits and/or Health Care Benefits) includes no amendments other than name or general grammatical changes described previously.

In addition to name and other general changes described previously, §38.13 of this title (relating to Right of Appeal) includes the following amendments. At §38.13(a)(1)(A), citations to other sections have been corrected. At §38.13(a)(1)(D), the reference to "the department" as the entity that establishes by rule provider reimbursement and the program's budget alignment methodologies has been updated to refer to "the commission." The terms "reimbursement" or "reimbursement methodologies" have been included, replacing "fee schedules" at §38.13(a)(1)(D) because "fee schedules" are more detailed, frequently changing lists that evolve from stated reimbursement methodologies.

There are no additional amendments to §38.14 of this title (relating to Development and Improvement of Standards and Services) includes no amendments other than name or general grammatical changes described previously.

Section 38.16(c)(3) has been clarified to state that provision of "health care benefits" may "or may not" include "coverage," rather than "payment," of outstanding bills in all cases.

At §38.16(c)(4), the process for providing limited health care benefits and/or payment of outstanding bills for health care benefits to as many clients with urgent need for health care benefits as possible who are on the waiting list and remain on the waiting list has been amended by adding the requirement that if family support services are included among limited health care benefits provided for clients with urgent need for health care benefits who are on the waiting list and remain on the waiting list, the coverage of family support services must be limited according to the parameters set forth in §38.16(b)(2)(C)(i). Those parameters require that family support services be provided to ongoing clients only to continue services already being provided, and/or when the specific services are required to prevent out-of-home placement of the client, and/or when the provision of such services is cost effective for the program.

At §38.16(d), the phrase "as described in subsection (a)(2) of this section" concerning funding analysis" has been deleted.

Section 38.16(d)(1)(A)(iii) and 38.16(d)(1)(A)(iv), concerning the order in which groups of clients shall be taken off the waiting list, have been deleted because they present administrative obstacles to implementation of §38.16(d) as a whole, and deletion causes neither favorable or adverse consequences for clients to whom the sections were applicable. Section 38.16(d)(1)(A)(v) and 38.16(d)(1)(A)(vi) have been renumbered as §38.16(d)(1)(A)(iii) and §38.16(d)(1)(A)(iv).

Section 38.16(d)(1)(B)(i) and 38.16(d)(1)(B)(ii), concerning providing health care benefits for clients taken off the waiting list, have been deleted as superfluous because §38.16(d)(1)(B) also has been amended by addition of the phrase, "as long as program unobligated funds are available," and the rule addressed at §38.16(d)(1)(B)(ii) repeats §38.16(c)(3)(B).

Section 38.16(d)(1)(C) has been amended to authorize payment of limited health care benefits for "clients who are on the waiting list and remain on the waiting list;" payment of outstanding bills for health care benefits for clients who are on the waiting list and remain on the waiting list; and/or "payment of outstanding bills for health care benefits for clients who have been taken off the waiting list." Consistent with changes to §38.16(c)(4), coverage of family support services must be limited according to the parameters set forth in §38.16(b)(2)(C)(i), if family support services are included among limited health care benefits. The requirement that clients on the waiting list be served in the same order as in paragraph (1) of the subsection and the limitation that only clients on the waiting list may be served by this provision have been deleted, and the reference to paragraphs (1) - (2) has been corrected.

Section 38.16(d)(1) has been amended to enable the program to expend unobligated funds after or while removing clients from the waiting list and providing them with health care benefits; only when projected unobligated funds are insufficient to take clients off the waiting list and also maintain continuous program health care benefits or when projected unobligated funds may lapse if not expended by the end of the fiscal year; only as long as program unobligated funds are available; and only if the outstanding bills for health care benefits are for dates of service that are within the time period that program unobligated funds are available and provided that the client is eligible for health care benefits at the time of the dates of service. The new language improves administrative efficiency and permits needed flexibility to expend unobligated funds near the end of a budget term.

At §38.16(d)(2)(B), the parenthetical phrase describing health care benefits has been amended by clarifying that "coverage," rather than "payment," of outstanding bills for health care benefits may "or may not" be included. "Or" at the end of §38.16(d)(2)(B) has been deleted as grammatically unnecessary.

Section 38.16(d)(2)(C) has been amended to be consistent with §38.16(d)(1)(C), as amended, and to provide limited health care benefits to clients "identified in subsection (d)(2)(A)(i) and (ii)

who are on the waiting list and remain on the waiting list;" and/or "payment of outstanding bills for health care benefits for clients who have been taken off the waiting list." Section 38.16(d)(2)(C) has also been amended by the addition of a sentence providing that the coverage of family support services must be limited according to the parameters set forth in §38.16(b)(2)(C)(i) if family support services are included among limited health care benefits.

Consistent with the requirements of §38.16(d)(1)(C), as amended, §38.16(d)(2)(C) has been amended by deletion of the requirement that clients on the waiting list be served in the same order as in paragraph (2)(A) of the subsection and the limitation that only clients on the waiting list may be served. These amendments make §38.16(d)(2) consistent with other sections, as amended, and increase the efficiency and flexibility with which the program may expend unobligated funds resulting from program cost savings near the end of a budget term.

FISCAL NOTE

Sam B. Cooper, III, MSW, LMSW, Unit Manager, Purchased Health Services Unit, Specialized Health Services Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

The department allocates legislative appropriations for the CSHCN program according to the following general budgetary categories: (1) health care benefits services for CSHCN who are uninsured or underinsured; (2) essential public health services including, but not limited to, case management, quality assurance, needs assessment, education/training, and information and referral for children with special health care needs and their families; and (3) program administration. CSHCN budgeting decisions are guided by the following principles: the CSHCN Program is not an entitlement program; the cost of services required to serve the needs of all the clients eligible to receive them is expected to exceed anticipated funding; and the program establishes and manages waiting lists according to the procedures to address CSHCN Services Program budget alignment as specified in rule.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Cooper has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed, because neither small businesses nor micro-businesses that are providers of CSHCN services will be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Mr. Cooper has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is improved accuracy and consistency in the rules, and more accurate interpretation of their intent. In addition, amendments to the rules will allow the program to function more efficiently and effectively.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted by mail to Kathy Griffis-Bailey, MS, Purchased Health Services Unit MC1938, Department of State Health Services G31000, 1100 West 49th Street, Austin, Texas 78756, by telephone at (512) 458-7111, extension 3069, or by email to kathy.griffisbailey@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

A public hearing to receive comments on the proposal is scheduled for January 17, 2006, at 9:00 a.m., at the Department of State Health Services, Room G-107, 1100 West 49th Street, Austin, Texas 78756. Persons who require disability-related accommodations or a language interpreter should contact Kathy Griffis-Bailey at 512/458-7111 at least three working days prior to the scheduled hearing time.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the proposal has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The Health and Safety Code, §§35.003, 35.004, 35.0041, 35.005, 35.006, 35.007, 35.009, and 12.001, authorize the executive commissioner of the Health and Human Services Commission to adopt rules for the performance of every duty imposed by law on the department and the commissioner of health. The Government Code, §531.0055(e), and the Health and Safety Code, §1001.075, also authorize the executive commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The proposed amendments affect Health and Safety Code, Chapter 35.

§38.1. Purpose and Common Name.

(a) Purpose. The purpose of this chapter is to implement the Services Program for Children with Special Health Care Needs (CSHCN) <u>that</u> [~~which~~] is authorized by Health and Safety Code, Chapter 35 to provide the following services to eligible children:

(1) - (7) (No change.)

(b) (No change.)

§38.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (2) (No change.)

[(3) Advisory committee--Those persons appointed by the Texas Board of Health to serve in an advisory capacity to the Children with Special Health Care Needs (CSHCN) Program staff.]

(3) [(4)] Applicant--A person making an initial application or re-application for CSHCN Services Program [program] services[, but who has not been determined eligible].

[(5) Board--The Texas Board of Health.]

(4) [(6)] Bona fide resident--A person who:

(A) is physically present within the geographic boundaries of the state;

(B) has an intent to remain within the state;

(C) maintains an abode within the state (i.e., house or apartment, not merely a post office box);

(D) has not come to Texas from another country for the purpose of obtaining medical care, with the intent to return to the person's native country;

(E) does not claim residency in any other state or country; and

(i) is a minor child residing in Texas whose parent(s), managing conservator, guardian of the child's person, or caretaker (with whom the child consistently resides and plans to continue to reside) is a bona fide resident;

(ii) is a person residing in Texas who is the legally dependent spouse of a bona fide resident; or

(iii) is an adult residing in Texas, including an adult whose parent(s), managing conservator, guardian of the adult's person, or caretaker (with whom the adult consistently resides and plans to continue to reside) is a bona fide resident or who is his/her own guardian.

(5) [(7)] Case management services--Case management services include, but are not limited to:

(A) planning, accessing, and coordinating needed health care and related services for children with special health care needs and their families. Case management services are performed in partnership with the child, the child's family, providers, and others involved in the care of the child and are performed as needed to help improve the well-being of the child and the child's family; and

(B) counseling for the child and the child's family about measures to prevent the transmission of AIDS or HIV and the availability in the geographic area of any appropriate health care services, such as mental health care, psychological health care, and social and support services.

(6) [(8)] Child with special health care needs--A person who:

(A) is younger than 21 years of age and who has a chronic physical or developmental condition; or

(B) has cystic fibrosis, regardless of the person's age; and

(C) may have a behavioral or emotional condition that accompanies the person's physical or developmental condition. The term does not include a person who has behavioral or emotional condition without having an accompanying physical or developmental condition.

(7) [(9)] CHIP--The Children's Health Insurance Program administered by the Texas Health and Human Services Commission under Title XXI of the Social Security Act.

(8) [(10)] Chronic developmental condition--A disability manifested during the developmental period for a child with special health care needs which results in impaired intellectual functioning or deficiencies in essential skills, which is expected to continue for a period longer than one year, and which causes a person to need assistance in the major activities of daily living and/or in meeting personal care needs. For the purpose of this chapter, a chronic developmental condition must include physical manifestations and may not be solely a delay in intellectual, mental, behavioral and/or emotional development.

(9) [(11)] Chronic physical condition--A disease or disabling condition of the body, of a bodily tissue or of an organ which will last or is expected to last for at least 12 months; that results, or without treatment, may result in limits to one or more major life activities; and that requires health and related services of a type or amount beyond those required by children generally. Such a condition may exist with accompanying developmental, mental, behavioral, or emotional conditions, but is not solely a delay in intellectual development or solely a mental, behavioral and/or emotional condition.

(10) [(12)] Claim form--The document approved by the CSHCN Services Program [CSHCN program-approved document] for submitting the unpaid claim for processing and payment.

(11) [(13)] Client--A person who has applied for program services and who meets all CSHCN Services Program [program] eligibility requirements and is determined to be eligible for program services.

(A) New client:

(i) a person who has applied to the program for the first time and who is determined to be eligible for program services; or

(ii) a person who has re-applied to the program (after a lapse in eligibility) and who is determined to be eligible for program services.

(B) Ongoing client--A client who currently is not on the program's waiting list.

(C) Waiting list client--A client who currently is on the program's waiting list.

(12) Commission--The Texas Health and Human Services Commission.

(13) [(14)] Commissioner--The Commissioner of Health.

(14) [(15)] Co-insurance--A cost-sharing arrangement in which a covered person pays a specified percentage of the charge for a covered service. The covered person may be responsible for payment at the time the health care service is provided.

(15) [(16)] Co-pay/Co-payment--A cost-sharing arrangement in which a client pays a specified charge for a specified service. The client is usually responsible for payment at the time the health care service is provided.

(16) [(17)] CSHCN Services Program [program]--The services program for children with special health care needs described in §38.1 of this title (relating to Purpose and Common Name).

(17) [~~(18)~~] Date of service (DOS)--The date a service is provided.

(18) [~~(19)~~] Deductible--A cost-sharing arrangement in which a client is responsible for paying a specific amount annually for covered services before an insurance carrier or plan begins to pay for covered services.

(19) [~~(20)~~] Dentist--An individual licensed by the State Board of Dental Examiners to practice dentistry in the State of Texas.

(20) [~~(21)~~] Department--The Department of State Health Services [~~Texas Department of Health~~].

(21) [~~(22)~~] Diagnosis and evaluation services--The process of performing specialized examinations, tests, and/or procedures to determine whether a CSHCN Services Program [~~program~~] applicant for health care benefits has a chronic physical or developmental condition as determined by a physician or dentist participating in the CSHCN Services Program [~~program~~] and/or to help determine whether a waiting list client has an "urgent need for health care benefits", according to the criteria and protocol described in §38.16(e) of this title (relating to Procedures to Address CSHCN Services Program Budget Alignment).

(22) [~~(23)~~] Eligibility date for the CSHCN Services Program [~~program~~] health care benefits--The effective date of eligibility for the CSHCN Services Program [~~program~~] health care benefits is 15 days prior to the date of receipt of the application, except in the following circumstances.

(A) The effective date of eligibility for newborns who are not born prematurely will be the date of birth. Newborn means a child 30 days old or younger.

(B) The effective date of eligibility following traumatic injury will be the day after the acute phase of treatment ends, but no earlier than 15 days prior to the date of receipt of the application.

(C) The effective date of eligibility for an applicant that is born prematurely will be the day after the applicant has been out of the hospital for 14 consecutive days, but no earlier than 15 days prior to the date of receipt of the application.

(D) The effective date of eligibility for applicants with spenddown is the day after the earliest DOS on which the cumulative bills are sufficient to meet the spenddown amount, but no earlier than 15 days prior to the date of receipt of the application. Only medical bills having a DOS within 12 months prior to [~~from~~] the date of receipt of the application, or a DOS within 6 [~~12~~] months after the financial eligibility denial date may be included to satisfy spenddown requirements. Medical bills for any member of the household for which the applicant, parent(s), guardian or managing conservator of the CSHCN Services Program applicant is responsible may be included. Medical bills used to meet spenddown cannot be paid by the CSHCN Services Program [~~program~~].

(E) Excluding applications for clients who are known to be ineligible for Medicaid and/or the CHIP due to age, citizenship status or insurance coverage, all applications must include a determination of eligibility from Medicaid and/or the CHIP. If the CSHCN Services Program application is received without a Medicaid determination, a CHIP determination, or other data/documents needed to process the application, it will be considered incomplete. The applicant will be notified that the application is incomplete and given 60 days to submit the Medicaid determination, CHIP denial or enrollment, or other missing data/documents to the CSHCN Services Program. If the application is made complete within the 60-day time limit, the client's eligibility effective date will be established as 15 days prior to the date the CSHCN Services Program application was first received. If the application is made complete more than 60 days after initial receipt, the eligibility effective date will be established as 15 days prior to the date the application was made complete.

(23) [~~(24)~~] Emergency--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent person with average knowledge of health and medicine could reasonably expect that the absence of immediate medical care could result in:

(A) placing the person's health in serious jeopardy;

(B) serious impairment to bodily functions; or

(C) serious dysfunction of any bodily organ or part.

(24) [~~(25)~~] Emotional or behavioral condition--Behavior which varies significantly from normal, that is chronic and does not quickly disappear, and that is unacceptable because of social or cultural expectations. Emotional or behavioral responses which are so different from those of the generally accepted, age-appropriate norms of people with the same ethnic or cultural background as to result in significant impairment in social relationships, self-care, educational progress, or classroom behavior. Examples include but are not limited to the following:

(A) an inability to build or maintain satisfactory age-appropriate interpersonal relationships with peers or adults;

(B) dangerously aggressive, self-destructive, severely withdrawn, or noncommunicative behaviors;

(C) a pervasive mood of unhappiness or depression; or

(D) evidence of excessive anxiety or fears.

(25) [~~(26)~~] Facility--A hospital, psychiatric hospital, rehabilitation hospital or center, ambulatory surgical center, renal dialysis center, specialty center and/or outpatient clinic.

(26) [~~(27)~~] Family--For the purpose of this chapter, the family includes the following persons who live in the same residence:

(A) the applicant;

(B) those related to the applicant as a parent, step-parent or spouse who have a legal responsibility to support the applicant or guardians/managing conservators who have a duty to provide food, shelter, education, and medical care for the applicant;

(C) children of the applicant; and

(D) children of a parent, step-parent or spouse.

(27) [~~(28)~~] Family support services--Disability-related support, resources, or other assistance provided to the family of a child with special health care needs. The term may include services described by Part A of the Individuals with Disabilities Education Act (20 U.S.C. § [~~Section~~] 1400 *et seq.*), as amended, and permanency planning, as that term is defined by Government Code, §531.151.

(28) [~~(29)~~] Financial independence--A person who currently files his or her own personal U.S. income tax return and is not claimed as a dependent by any other person on his or her U.S. income tax return.

(29) [~~(30)~~] Health care benefits--CSHCN Services Program benefits consisting of diagnosis and evaluation services, rehabilitation services, medical home care management services, family support services, transportation related services, and insurance premium payment services.

(30) [~~(31)~~] Health insurance/health benefits plan--A policy or plan, either individual, group, or government-sponsored, that an in-

dividual purchases or in which an individual participates that provides benefits when medical and/or dental costs are or would be incurred. Sources of health insurance include, but are not limited to, health insurance policies, health maintenance organizations, preferred provider organizations, employee health welfare plans, union health welfare plans, medical expense reimbursement plans, United States Department of Defense or Department of Veterans Affairs benefit plans [~~the Civilian Health and Medical Program of the Uniformed Services/Veterans Administration (CHAMPUS, CHAMPVA) or their successor plans~~], Medicaid, the Children's Health Insurance Program (CHIP), and Medicare. Benefits may be in any form, including, but not limited to, reimbursement based upon cost, cash payment based upon a schedule, or access without charge or at minimal charge to providers of medical and/or dental care. Benefits from a municipal or county hospital, joint municipal-county hospital, county hospital authority, hospital district, county indigent health care programs, or the facilities of a medical school shall not constitute health insurance for purposes of this chapter.

(31) [~~(32)~~] Household--The living unit in which the applicant resides and which also may include one or more of the following:

(A) mother;

(B) father;

(C) stepparent;

(D) spouse;

(E) foster parent(s), managing conservator, or guardian;

(F) grandparent(s);

(G) sibling(s);

(H) stepbrother(s); or

(I) stepsister(s).

(32) [~~(33)~~] Medical home--A respectful partnership between a client, the client's family as appropriate, and the client's primary health care setting. A medical home is family centered health care that is accessible, continuous, comprehensive, coordinated, compassionate, and culturally competent. A medical home includes a licensed medical professional who accepts responsibility for the provision and/or coordination of primary, preventive, and/or specialty care for a client, and coordination of care with other community services providers. [~~A source of ongoing routine health care in the community in which providers and families work as partners to meet the needs of children and families. The medical home assists in early identification of special health care needs; provides ongoing primary care; and coordinates with a broad range of other specialty, ancillary, and related services.~~]

(33) [~~(34)~~] Natural home--The home in which a [~~the eligible~~] person lives that is either the residence of his/her parent(s), foster parent(s) or guardian(s), or extended family member(s), or the home in the community where the person has chosen to live, alone or with other persons. A natural home may utilize natural support systems such as family, friends, co-workers, and services available to the general population as they are available.

~~[(35) Newborn screening--The process required by law through which newborn children are screened for congenital anomalies, including but not limited to hearing impairment, congenital adrenal hyperplasia, congenital hypothyroidism, galactosemia, phenylketonuria, and hemoglobinopathies, such as sickle cell disease.]~~

(34) [~~(36)~~] Other benefit--A benefit, other than a benefit provided under this chapter, to which a person is entitled for payment of the costs of services included in the scope of coverage of [~~provided under~~] the CSHCN Services Program [~~program~~] including, but not limited to, benefits available from:

(A) an insurance policy, group health plan, health maintenance organization, or prepaid medical or dental care plan;

(B) home, auto, or other liability insurance;

(C) [~~(B)~~] Title XVIII, Title XIX, or Title XXI of the Social Security Act (42 U.S.C. §§ [~~Sections~~] 1395 *et seq.*, 1396 *et seq.*, and 1397aa *et seq.*), as amended;

(D) [~~(C)~~] the United States Department of Veterans Affairs;

(E) [~~(D)~~] the United States Department of Defense [~~the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)~~];

(F) [~~(E)~~] workers' compensation or any other compulsory employers' insurance program;

(G) [~~(F)~~] a public program created by federal or state law or under the authority of a municipality or other political subdivision of the state, excluding benefits created by the establishment of a municipal or county hospital, a joint municipal-county hospital, a county hospital authority, a hospital district, or the facilities of a publicly supported medical school; or

(H) [~~(G)~~] a cause of action for the cost of care, including medical care, dental care, facility care, and medical supplies, required for a person applying for or receiving services from the department, or a settlement or judgment based on the cause of action, if the expenses are related to the need for services provided under this chapter.

(35) [~~(37)~~] Permanency planning--A planning process undertaken for children with chronic illness or developmental disabilities who reside in institutions or are at risk of institutional placement, with the explicit goal of securing a permanent living arrangement that enhances the child's growth and development, which is based on the philosophy that all children belong in families and need permanent family relationships. Permanency planning is directed toward securing: a consistent, nurturing environment; an enduring, positive adult relationship(s); and a specific person who will be an advocate for the child throughout the child's life. Permanency planning provides supports to enable families to nurture their children; to reunite with their children when they have been placed outside the home; and to place their children in family environments.

(36) [~~(38)~~] Person--An individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

(37) [~~(39)~~] Physician--A person licensed by the Texas State Board of Medical Examiners to practice medicine in this state.

(38) [~~(40)~~] Prematurity/born prematurely--A child born at less than 36 weeks gestational age and hospitalized since birth.

(39) [~~(41)~~] Program--The services program for Children with Special Health Care Needs (CSHCN).

(40) [~~(42)~~] Provider--A person and/or facility as defined in §38.6 of this title (relating to Providers) that delivers services purchased by the CSHCN Services Program [~~program~~] for the purpose of implementing the Act.

(41) [~~(43)~~] Rehabilitation services--The process of the physical restoration, improvement, or maintenance of a body function destroyed or impaired by congenital defect, disease, or injury which includes the following acute and chronic/rehabilitative services:

(A) facility care, medical and dental care, and occupational, speech, and physical therapies;

(B) the provision of medications, braces, orthotic and prosthetic devices, durable medical equipment, and other medical supplies; and

(C) other services specified in this chapter.

(42) [~~(44)~~] Respite care--A service provided on a short-term basis for the purpose of relief to the primary care giver in providing care to individuals with disabilities. Respite services can be provided in either in-home or out-of-home settings on a planned basis or in response to a crisis in the family where a temporary caregiver is needed.

(43) [~~(45)~~] Routine child care--Child care for a child who needs supervision while the parent/guardian is at work, in school, or in job training.

(44) [~~(46)~~] Services--The care, activities, and supplies provided under the Act, including but not limited to both acute and chronic/rehabilitative medical care, dental care, facility care, medications, durable medical equipment, medical supplies, occupational, physical, and speech therapies, family support services, case management services, and other care specified by program rules.

(45) [~~(47)~~] Social service organization--For purposes of this chapter, a for-profit or nonprofit corporation or other entity, not including individual persons, that provides funds for travel, meal, lodging, and family supports expenses in advance to enable CSHCN Services Program clients to obtain program services.

(46) [~~(48)~~] Specialty center--A facility and staff that meets the CSHCN Services Program [~~program~~] minimum standards established in this chapter and are designated for [~~CSHCN program~~] use by CSHCN Services Program clients as part of the comprehensive services for a specific medical condition.

(47) [~~(49)~~] Spenddown--Financial eligibility achieved when household income exceeds 200% of the federal poverty level, if the applicant's family can document its responsibility for household medical bills that are equal to or greater than the amount in excess of the 200% level.

(48) [~~(50)~~] State--The State of Texas.

(49) [~~(51)~~] Supplemental Security Income Program (SSI)--Title XVI of the Social Security Act which provides for payments to individuals (including children under age 18) who are disabled and have limited income and resources.

(50) [~~(52)~~] Support--The contribution of money or services necessary for a person's maintenance, including, but not limited to, food, clothing, shelter, transportation, and health care.

(51) [~~(53)~~] Treatment plan--The plan of care for the client (time and treatment specific) as certified by and implemented under the supervision of a physician or other practitioner participating in the CSHCN Services Program [~~program~~].

(52) [~~(54)~~] United States Public Health Service (USPHS) price--The average manufacturer price for a drug in the preceding calendar quarter under Title XIX of the Social Security Act, reduced by the rebate percentage, as authorized by the Veterans Health Care Act of 1992 (P.L. 102-585, November 4, 1992).

(53) [~~(55)~~] Urgent need for health care benefits--A client need that fits the criteria and protocol described in §38.16(e) of this title.

§38.3. Eligibility for [~~CSHCN Program~~] Services.

(a) Eligibility for health care benefits. In order to be determined eligible for CSHCN Services Program [~~program~~] health care benefits, applicants must meet the medical, financial, and other criteria in this section.

(1) Medical criteria. At least annually, a [~~A~~] physician or dentist must certify [~~annually~~] that the person meets the definition of "child with special health care needs" as defined by §38.2(6) [~~§38.2(8)~~] of this title (relating to Definitions). The medical criteria certification must be based upon a physical examination conducted within the 12 months immediately preceding the date of certification. The physician or dentist must document the [~~The CSHCN program must receive a~~] medical diagnosis code and descriptor from the International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM), or its successor, for the person's primary diagnosis that meets the medical criteria certification definition and for each of the person's other medical conditions [~~on each condition~~] for statistical and referral purposes. To facilitate application to the CSHCN Services Program for certain applicants, the CSHCN Services Program Medical Director may accept written documentation of medical criteria certification submitted by a physician or dentist who is licensed to practice in a state or jurisdiction of the United States of America other than Texas. The CSHCN Services Program does not reimburse for written documentation of medical criteria certification. If a physician or dentist requests coverage of diagnosis and evaluation services to determine if the person [~~child/applicant~~] meets the definition of a "child with special health care needs", and the person [~~applicant~~] meets all other eligibility criteria for health care benefits, then the person [~~applicant~~] may be given up to 60 days of program coverage for diagnosis and evaluation services only. Only CSHCN Services Program participating providers as specified in §38.6 of this title (relating to Providers), may be reimbursed for services as defined in §38.2 of this title (relating to Definitions).

(2) Financial criteria. Financial criteria are determined every six months, or as directed by statutory requirements. Financial criteria [~~annually and~~] are based upon the same determinations of income, family size, and disregards as the CHIP. Premiums [~~The CHIP net income is the family's gross income minus disregards. For applicants who are not eligible for CHIP, premiums~~] paid for health insurance may be included as a [~~an additional~~] disregard. All families must verify their income and disregards, if applicable.

(A) The income level for eligibility is 200% of the federal poverty level. If the family income exceeds this level, and the applicant's family can document its responsibility for household medical bills incurred within 12 months prior to [~~of~~] the application date or within 6 [~~12~~] months after the financial eligibility denial date that are equal to or greater than the amount in excess of the 200% level, the applicant may be determined financially eligible for a period of 6 [~~12~~] months, or as directed by statutory requirements, beginning on the eligibility date.

(B) Applications to Medicaid and the Supplemental Security Income (SSI) programs.

(i) If actual or projected CSHCN Services Program [~~program~~] expenditures for an ongoing [~~a~~] client currently not eligible for Medicaid exceed $2,000 per year, and the client's age and [~~the client whose age, medical condition, or~~] citizenship status meet [~~do not exceed~~] Medicaid eligibility criteria, the client shall be required to apply for any applicable Medicaid programs [~~Medicaid, specifically including the Medically Needy program~~] and, if eligible, to participate in those programs in order to remain eligible for further CSHCN Services Program [~~program~~] benefits. Within 60 days of the date of the notification letter, the client must submit to the CSHCN Services Program [~~program~~] documentation of an eligibility determination from Medicaid. During this 60-day period, CSHCN Services Program [~~program~~]

coverage will continue. If the client does not provide documentation of an eligibility determination from Medicaid within the 60-day time limit, CSHCN Services Program [~~program~~] coverage shall be terminated and may not be reinstated unless an eligibility determination is received. The program may grant the client a 30-day extension to obtain the determination.

(ii) The CSHCN Services Program [~~program~~] also may require an ongoing [~~a~~] client for whom actual or projected expenditures exceed $2,000 per year to apply for the SSI program, and, if eligible, to participate in that program in order to remain eligible for further CSHCN Services Program [~~program~~] benefits. Within 60 days of the date of the notification letter, the client must submit to the CSHCN Services Program [~~program~~] verification of a timely and complete application to SSI. During this 60-day period, CSHCN Services Program [~~program~~] coverage will continue. If the client does not provide this verification within the 60-day time limit, CSHCN Services Program [~~program~~] coverage may be terminated. With verification of an application to SSI, the program may continue coverage, pending receipt of an SSI eligibility determination.

(3) Health insurance.

(A) All health insurance coverage insuring the applicant and/or family must be listed on the application. If insurance coverage was effective prior to CSHCN Services Program [~~program~~] eligibility, such coverage must be kept in force. Noncompliance with this requirement may result in the termination of CSHCN Services Program [~~program~~] benefits. If insurance cannot be maintained, the applicant or parent/guardian/managing conservator must, upon request, provide to the CSHCN Services Program [~~program~~] proof of:

(i) - (iv) (No change.)

(B) If the applicant/client does not have health insurance at the time of application or eligibility renewal, but coverage may be available, including coverage under Medicaid or CHIP, the applicant/client that is not ineligible for such coverage by reason of age, citizenship, or residency status must apply for coverage and receive an eligibility determination within 60 days of the date of notification. With verification of an application to Medicaid, CHIP, or an available health insurance plan, the program may extend this deadline [~~and/or continue CSHCN program coverage~~], pending receipt of an insurance eligibility determination. If the applicant/client is eligible for any other health insurance [~~CHIP~~], the applicant/client must be enrolled [~~in CHIP~~]. Such insurance must be kept in force as though it were effective prior to CSHCN Services Program [~~program~~] eligibility.

(C) The CSHCN Services Program [~~program~~] will assist in determining possible eligibility for insurance and may provide CSHCN Services Program [~~program~~] benefits for ongoing clients during insurance application, enrollment, and/or limited or excluded coverage periods. [~~A family support services plan for an applicant may not be implemented until the determination of program eligibility, including eligibility for available insurance plans is complete.~~]

(D) Before canceling, terminating, or discontinuing existing health insurance, or electing not to enroll a client in available health insurance, including canceling, terminating, discontinuing, or not enrolling in CHIP, the parent/guardian/managing conservator must notify the CSHCN Services Program [~~program~~] 30 days prior to cancellation, termination, discontinuance, or end of the enrollment period. When the CSHCN Services Program [~~program~~] provides assistance in keeping or acquiring health insurance, the parent/guardian/managing conservator must maintain or enroll in the health insurance.

(4) - (5) (No change.)

(6) Application.

(A) Applications are available to anyone seeking assistance from the CSHCN Services Program [~~program~~]. To be considered by the CSHCN Services Program [~~program~~], the application must be made on forms currently in use.

(B) A person is considered to be an applicant from the time that the CSHCN Services Program [~~program~~] receives an application. The CSHCN Services Program [~~program~~] will respond in writing regarding eligibility status within 30 working days after the completed application is received. Applications will be considered:

(i) - (iii) (No change.)

(C) The denial of any application submitted to the CSHCN Services Program [~~program~~] shall be in writing and shall include the reason(s) for such denial. The applicant has the right of administrative review and a fair hearing as set out in §38.13 of this title (relating to Right of Appeal).

(D) Any person has the right to reapply for CSHCN Services Program [~~program~~] coverage at any time or whenever the person's situation or condition changes.

(7) Verification of information.

(A) The CSHCN Services Program [~~program~~] shall make the final determination on a person's eligibility using the information provided with the application. The CSHCN Services Program [~~program~~] may request verification of any information provided by the applicant to establish eligibility.

(B) The CSHCN Services Program [~~program~~] shall verify selected information on the application. Documentation of date of birth, residency, income, and income disregards shall be required. The CSHCN Services Program [~~program~~] shall notify the applicant/family in writing when specific documentation is required. It is the applicant's/family's responsibility to provide the required information.

(C) Those applicants/clients financially eligible for CHIP, Medicaid, or other programs with eligibility [~~similar~~] income guidelines that [~~who also~~] meet the CSHCN Services Program's eligibility income guidelines, who also meet the CSHCN Services Program's age and residency requirements, [~~of the CSHCN program~~] will be considered financially eligible. The applicant/client/family must notify the CSHCN Services Program [~~program~~], if the applicant/client is no longer eligible for such programs.

(8) Determination of continuing eligibility for health care benefits. Financial [~~Medical and financial~~] criteria for eligibility for health care benefits must be re-established every six months, or as directed by statutory requirements. Medical criteria must be re-established at least annually (i.e., within 365 days from the first day of the client's current eligibility period, or within 366 days during a leap year). Ongoing clients for health care benefits will be notified of CSHCN Services Program [~~program~~] deadlines for [~~annual~~] re-establishment of eligibility. If an ongoing client for health care benefits does not meet CSHCN Services Program [~~program~~] deadlines for submitting information required for the [~~annual~~] determination of continuing eligibility, the client's eligibility for health care benefits will end. If the then former client re-applies to the CSHCN Services Program [~~program~~] after such lapse in eligibility and is determined eligible for health care benefits, the former client will be considered a new client. If the CSHCN Services Program [~~program~~] has a waiting list for health care benefits, the new client will be placed on the waiting list in order according to the date/time the client is determined eligible for [~~the program~~] health care benefits.

(b) Eligibility for case management services. The CSHCN Services Program [~~program~~] may provide and/or reimburse for case

management services to persons in need of such services who are bona fide residents and who are determined not to have another primary provider and/or funding source for such services. The program's case management services are focused on individuals (and their families) who are eligible, seeking eligibility, or potentially seeking eligibility for the program's health care benefits (includes clients who are on the waiting list for health care benefits). However, the program may offer and provide case management services to individuals (and their families) who are neither eligible nor seeking eligibility for the program's health care benefits.

§38.4. Covered Services.

(a) Introduction. The CSHCN Services Program [~~program~~] provides no direct medical services, but reimburses for services rendered by CSHCN Services Program [~~program~~] participating providers and/or contractors. Clients must receive services as close to their home communities as possible, unless CSHCN Services Program [~~program~~] contracts or policies require treatment at specific facilities or specialty centers and/or the clients' conditions require specific specialty care.

(b) Types of service.

(1) Early identification. The CSHCN Services Program [~~program~~] may conduct outreach activities to identify children for program enrollment, increase their access to care, and help them use services appropriately. Outreach services may include, but are not limited to:

(A) CSHCN Services Program [~~program~~] promotion to the general public, or targeted to potential clients and providers;

(B) - (E) (No change.)

(2) Diagnosis and evaluation services. May be covered for the purpose of determining whether a CSHCN Services Program [~~program~~] applicant for health care benefits meets the CSHCN Services Program [~~program~~] definition of a child with special health care needs. Diagnosis and evaluation services must be prior authorized and coverage is limited in duration. If a physician or dentist requests coverage of diagnosis and evaluation services to determine if the child/applicant meets the definition of a "child with special health care needs,"[~~,~~] and the applicant meets all other eligibility criteria, then the applicant may be given up to 60 days of program coverage for diagnosis and evaluation services only. The program medical director or other designated medical staff may prior authorize limited coverage of diagnosis and evaluation services for waiting list clients if needed to help determine "urgent need for health care benefits" as described in §38.16(e) of this title (relating to Procedures to Address CSHCN Services Program Budget Alignment). Only CSHCN Services Program [~~program~~] participating providers may be reimbursed for diagnosis and evaluation services.

(3) Rehabilitation services. Rehabilitation services means a process of physical restoration, improvement, or maintenance of a body function destroyed or impaired by congenital defect, disease, or injury which includes the following acute and chronic/rehabilitative services: facility care, medical and dental care, occupational, speech, and physical therapies, the provision of medications, braces, orthotic and prosthetic devices, durable medical equipment, other medical supplies, and other services specified in this chapter. To be eligible for CSHCN Services Program [~~program~~] reimbursement, treatment must be for a client [~~with a chronic physical or developmental condition as specified in §38.3(a)(1) of this title (relating to Eligibility for CSHCN Program Services),~~] and must have been prescribed by a provider in compliance with all applicable laws and regulations of the State of Texas. Services may be limited, and the availability of certain services described in the following subparagraphs is contingent upon implementation of automation procedures and systems.

(A) Medical assessment and treatment. Medical assessment and treatment services, including medically necessary laboratory and radiology studies, must be provided by physicians and other practitioners licensed by the State of Texas, enrolled as participating providers in the CSHCN Services Program [~~program~~], and within the scope of their respective licenses or registrations.

(B) Outpatient mental health services. Outpatient mental health services are limited to no more than 30 encounters in a calendar year by all professionals licensed to provide mental/behavioral health services, including psychiatrists, psychologists, licensed clinical social workers (LCSW) [~~master social worker-advanced clinical practitioners~~], licensed marriage and family therapists, and licensed professional counselors, per eligible client per calendar year. Coverage includes, but is not limited to psychological or neuropsychological testing, psychotherapy, psychoanalysis, counseling, and narcosynthesis.

(C) Preventive and therapeutic dental services (including oral/maxillofacial surgery). Preventive and therapeutic dental services must be provided by licensed dentists enrolled to participate in the CSHCN Services Program [~~program~~]. Coverage for therapeutic dental services, including prosthetics and oral/maxillofacial surgery, follows the Texas Medicaid program guidelines. Orthodontic care may be provided only for CSHCN eligible clients with diagnoses of cleft/craniofacial abnormalities and/or late effects of fractures of the skull and face bones.

(D) Podiatric services. Podiatric services must be provided by licensed podiatrists enrolled to participate in the CSHCN Services Program [~~program~~]. Coverage is limited to the medically necessary treatment of foot and ankle conditions and follows the Texas Medicaid program guidelines. Supportive devices, such as molds, inlays, shoes, or supports, must comply with coverage limitations for foot orthoses.

(E) Treatment in CSHCN Services Program [~~program~~] participating facilities. Non-emergency hospital care must be provided in facilities that [~~which~~] are enrolled as CSHCN Services Program [~~program~~] participating providers. The length of stay is limited according to diagnosis, procedures required, and the client's condition.

(i) Inpatient hospital care and inpatient psychiatric care.

(I) (No change.)

(II) Inpatient psychiatric care. Coverage is limited to inpatient assessment and crisis stabilization and is to be followed by referral to an [~~the Texas Department of Mental Health and Mental Retardation programs or other~~] appropriate public or private mental health program. Admission must be prior authorized [~~and is limited to five days~~]. Services include those medically necessary and furnished by a Medicaid psychiatric hospital/facility under the direction of a psychiatrist.

(ii) Inpatient rehabilitation care. Medically necessary inpatient rehabilitation care is limited to an initial admission not to exceed 30 days, based on the functional status and potential of the client as certified by a physician participating in the CSHCN Services Program [~~program~~]. Services beyond the initial 30 days may be approved by the CSHCN Services Program [~~program~~] based upon the client's medical condition, plan of treatment, and progress. Payment for inpatient rehabilitation care is limited to 90 days during a calendar year.

(iii) Ambulatory surgical care. Ambulatory surgical care is limited to the medically necessary treatment of a client and may be performed only in CSHCN Services Program [~~program~~] approved

ambulatory surgical centers as defined in §38.7 of this title (relating to Ambulatory Surgical Care Facilities).

(iv) Emergency care. Care including, but not limited to hospital emergency departments, ancillary, and physician services, is limited to medical conditions manifested by acute symptoms of sufficient severity (including severe pain) such that a prudent person with average knowledge of health and medicine could reasonably expect that the absence of immediate medical care could result in placing the client's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. If a client is admitted to a non-participating CSHCN Services Program [~~program~~] hospital provider following care in that provider's emergency room, and the admitting facility declines to enroll or does not qualify as a CSHCN Services Program [~~program~~] provider, the client must be discharged or transferred to a participating CSHCN Services Program [~~program~~] provider as soon as the client's medical condition permits. All providers must enroll in order to receive reimbursement.

(v) Care for renal disease. Renal dialysis is limited to the treatment of acute renal disease or chronic (end stage) renal disease through a renal dialysis facility and includes, but is not limited to dialysis, laboratory services, drugs and supplies, declotting shunts, on-site physician services, and appropriate access surgery. Renal transplants may be covered in approved renal transplant centers if the projected cost of the transplant and follow-up care is less than that of continuing renal dialysis. Renal transplants must be prior authorized.

(F) - (G) (No change.)

(H) Nutrition services and nutritional products, excluding hyperalimentation/total parenteral nutrition (TPN).

(i) (No change.)

(ii) Nutritional products. Nutritional products, including over-the-counter products, are limited to those covered by the CSHCN Services Program [~~program~~] and prescribed by a practitioner licensed to do so, for the treatment of an identified metabolic disorder or other medical condition and serving as a medically necessary therapeutic agent for life and health, or when part or all nutritional intake is through a tube.

(I) (No change.)

(J) Medical foods. Coverage for medical foods is limited to the treatment of inborn metabolic disorders. Treatment for any other condition with medical foods requires documentation of medical necessity and prior authorization. Medical foods are approved products listed in enrolled providers' catalogs and are lacking in the compounds that cause complications of a covered metabolic disorder.

(K) [~~(J)~~] Durable medical equipment. All equipment must be prescribed by a practitioner licensed to do so. Some equipment may be supplied on a contract basis, and therefore, shall be ordered from a specific supplier.

(L) [~~(K)~~] Medical supplies. Supplies must be medically necessary for the treatment of an eligible client.

(M) [~~(L)~~] Professional vision services. Vision services medically necessary for the treatment of a client include, but are not limited to:

(i) medically necessary eye examinations with refraction for diagnoses of refractive error, aphakia, diseases of the eye, or eye surgery;

(ii) one eye examination with refraction for the purpose of obtaining eyewear during a calendar [~~the state fiscal~~] year; and

(iii) one pair of non-prosthetic eye wear per calendar year prescribed by a practitioner licensed to do so.

(N) [~~(M)~~] Speech-language pathology/audiology. Speech-language pathology and audiology services medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a speech-language pathologist or audiologist licensed by the State of Texas. CSHCN Services Program [~~program~~] coverage of speech-language pathology and audiology services may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the client is eligible for services for which a school district is legally responsible.

(O) [~~(N)~~] Audiological testing, hearing exams, and amplification devices. Services for clients under 21 years of age are coordinated through the Program for Amplification for Children of Texas (PACT). For clients 21 years of age and older and those ineligible for the PACT, covered services are the same as those available through the PACT.

(P) [~~(O)~~] Occupational and physical therapy. Occupational and physical therapy medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a therapist licensed by the State of Texas. CSHCN Services Program [~~program~~] coverage of physical and occupational therapy may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the child is eligible for services for which a school district is legally responsible.

(Q) [~~(P)~~] Certified respiratory care practitioner services. Respiratory therapy medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a certified respiratory care practitioner. CSHCN Services Program [~~program~~] coverage of respiratory therapy may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the child is eligible for services for which a school district is legally responsible.

(R) [~~(Q)~~] Home health nursing services. Home health nursing services must be medically necessary, be prescribed by a physician, and be provided only by a licensed and certified home and community support services agency participating in the CSHCN Services Program [~~program~~]. Home health nursing services are limited to 200 hours per client per calendar year. Up to 200 additional hours of service per client per calendar year may be approved with documented justification of need and cost effectiveness.

(S) [~~(R)~~] Hospice care. Hospice care includes palliative care for clients with a presumed life expectancy of six months or less during the last weeks and months before death. Services apply to care for the hospice terminal diagnosis condition or illnesses. Treatment for conditions unrelated to the terminal condition or illnesses is unaffected. Hospice care must be prescribed by a practitioner licensed to do so who also is enrolled as a CSHCN Services Program provider.

(4) Care management.

(A) Medical home. Each CSHCN Services Program [~~program~~] client should receive care in the context of a medical home.

(i) Comprehensive coordinated health care of infants, children, and adolescents should encompass the following services:

(I) - (V) (No change.)

(VI) maintenance of a central record and database [~~data base~~] containing all pertinent medical information about the client, including information about hospitalizations.

(ii) The CSHCN Services Program [~~program~~] may require periodic reports from the medical home.

(B) (No change.)

(5) Family support services. Family support services include disability-related support, resources, or other assistance and may be provided to the family of a client with special health care needs.

(A) Eligibility. A client is eligible to receive family support services if:

~~*[(i)* the client is fully eligible for the CSHCN program health care benefits;]~~

(i) [~~(ii)~~] the client is not receiving services from a Medicaid home and community-based waiver program, and the requested service does not duplicate services received from other family support programs, such as the In-Home and Family Support program, the Primary Home Care Program, or the Medically Dependent Children's Program [~~at the Texas Department of Human Services or the Texas Department of Mental Health and Mental Retardation~~]; and

(ii) [~~(iii)~~]the client's family collaborates with the assigned case manager to identify and pursue other sources of support and to develop a family assessment and service [~~support services~~] plan.

(B) Processing and evaluation of requests.

(i) Families of clients indicate their need for family support services [~~in writing at the time of their application or renewal for the CSHCN program, or at any time during their eligibility period for the CSHCN program~~].

(ii) (No change.)

(iii) All requests for family support services must be prior authorized (approved by the CSHCN Services Program [~~program~~] prior to delivery).

(iv) While there is a waiting list for health care benefits, limitations in reimbursement and/or prior authorization may be instituted as provided in §38.16 of this title.

(v) - (ix) (No change.)

(C) Service plan and cost allowances.

(i) In order to obtain prior authorization for family support services, the case manager and the client/family must develop a family assessment and service [~~written family support services~~] plan.

(ii) The CSHCN Services Program [~~program~~] may establish annual cost allowances based upon the client's/family's level of assessed need for family support services, not to exceed:

(I) (No change.)

(II) assistance of up to $3,600 per calendar year per eligible client to purchase other allowable services. This limit may increase to no more than $7,200 for the purchase of vehicle lifts and modifications;

(iii) Service plan cost allowances may be prorated for plans that cover less than one calendar year.

(iv) Disbursement of assistance:

(I) (No change.)

(II) may be made to the family or to the vendor enrolled as a CSHCN Services Program provider; and

(III) (No change.)

(v) (No change.)

(vi) The annual family assessment and service plan may be amended at any time, but will be reevaluated by the client/family and case manager at least annually to coincide with the client's reapplication for the CSHCN Services Program [~~program~~].

(D) Allowable services.

(i) Family support services for CSHCN Services Program clients and their families include those allowable services and items that:

(I) - (III) (No change.)

(ii) (No change.)

(iii) Allowable services include:

(I) - (IV) (No change.)

(V) vehicle lifts and modifications consistent with those available through the Department of Assistive and Rehabilitative Services (DARS) [~~Texas Rehabilitation Commission~~], limited to lifts, wheelchair tie-downs, occupant restraints, accessories/modifications such as raising roofs or doors if necessary for lift installation or usage, hand controls, and repairs of covered modifications not related to inappropriate handling or misuse of equipment and not covered by other resources;

(VI) - (VII) (No change.)

(E) Unallowable services. Family support funds may not be used to provide those services that do not relate to the client's disability and do not directly support the client's living in his/her natural home and participating in family life and integrated/inclusive community activities. Examples of unallowable services include, but are not limited to:

(i) - (viii) (No change.)

(ix) costs for allowable services incurred before the requested family support service is prior authorized [~~written service plan is approved~~];

(x) (No charge.)

(xi) medical benefit items or services paid for or reimbursed by private insurance, Medicaid, Medicare, CHIP, the CSHCN Services Program [~~program~~] or other health insurance programs for which the client is eligible;

(xii) services, equipment, or supplies that have been denied by Medicaid, CHIP, or the CSHCN Services Program [~~program~~] because a claim was received after the filing deadline, insufficient information was submitted, or because an item was considered inappropriate or experimental;

(xiii) - (xx) (No change.)

(F) Reduction/termination of services. Reasons for terminating or reducing family support services may include, but are not limited to:

(i) the client no longer meets the eligibility criteria for the CSHCN Services Program [~~program~~];

(ii) (No change.)

(iii) While there is a waiting list for health care benefits, limitations in reimbursement and/or prior authorization may be instituted as provided in §38.16 of this title;

(iv) - (viii) (No change.)

(ix) the family knowingly does not comply with the family assessment and service [~~written family support services~~] plan, in which case the family may also be liable for restitution.

(6) Other types of services. The following services also are available through the CSHCN Services Program [~~program~~].

(A) (No change.)

(B) Transportation. The CSHCN Services Program [~~program~~] may provide transportation for a client and, if needed, a responsible adult, to and from the nearest medically appropriate facility (in Texas or in the United States 50 or fewer miles from the Texas border) to obtain medically necessary and appropriate health care services that are within the scope of coverage of the CSHCN Services Program and are provided by a CSHCN Services Program enrolled provider. The lowest-cost appropriate conveyance should be used. The CSHCN Services Program [~~program~~] shall not assist if transportation is the responsibility of the client's school district or can be obtained through Medicaid. Transportation to out-of-state services located more than 50 miles from the Texas border will not be approved, except as specified in §38.6(e) of this title (relating to Providers).

(C) Meals and lodging. The CSHCN Services Program [~~program~~] may provide meals and lodging to enable a parent, guardian, or their designee to obtain inpatient or outpatient care for a client at a facility located away from their home. The reason for the inpatient or outpatient visit must be directly related to medically necessary treatment for the client that is provided by program enrolled providers and covered by the program. Meals and lodging associated with travel to services that are provided more than 50 miles from the Texas border will not be approved, except as specified in §38.6(e) of this title.

(D) Transportation of deceased. The CSHCN Services Program [~~program~~] may provide the following services:

(i) transportation cost for the remains of a client who expires in a CSHCN Services Program participating facility while receiving CSHCN Services Program health care benefits [~~program services~~], if the client was not in the family's city of residence in Texas, and the transportation cost of a parent or other person accompanying the remains, from the facility to the place of burial in Texas that is designated by the parent or other person legally responsible for interment;

(ii) - (iv) (No change.)

(E) Payment of insurance premiums, coinsurance, co-payments, and/or deductibles. The CSHCN Services Program [~~program~~] may pay public or private health insurance premiums to maintain or acquire a health benefit plan or other third party coverage for the client, if the parent/foster parent/guardian/managing conservator is financially unable to do so, and if paying for such health insurance can reasonably be expected to be cost effective for the CSHCN Services Program [~~program~~]. The CSHCN Services Program [~~program~~] may pay for coinsurance and deductible amounts when the total amount paid (including all payers) to the provider does not exceed the maximum allowed by the CSHCN Services Program for the covered service. The CSHCN Services Program [~~program~~] may reimburse clients for co-payments paid for covered services. The CSHCN Services Program [~~program~~] may not pay premiums, deductibles, coinsurance or co-payments for clients enrolled in CHIP.

(c) Services not covered. Services which are not covered by the CSHCN Services Program [~~program~~] even though they may be medically necessary for and provided to a client include, but are not limited to:

(1) - (4) (No change.)

(5) pregnancy prevention, except when medically necessary for the specific treatment of a [~~covered~~] condition meeting the parameters of the "child with special health care needs" definition;

(6) maternity care services specific to routine pregnancy care, labor and delivery, and maternal post-partum care; and

(7) infertility treatment or other reproductive services, unless directly related to a [~~covered chronic physical or developmental~~] condition meeting the parameters of the "child with special health care needs" definition.

(d) Service authorization. The CSHCN Services Program [~~program~~] may require authorization (including prior authorization) of reimbursement for selected services for clients.

(1) Provider's responsibility. A CSHCN Services Program provider must request services in specific terms on department-prepared forms so that an authorization may be issued and sufficient monies encumbered to cover the cost of the service. If a service is authorized, payment may be made to the provider as long as the service is not covered by a third party resource, and all billing requirements are met. Program authorization should not be considered an absolute guarantee of payment. Once a service is delivered and if the service requires authorization for payment, the authorization request for that service must be submitted within 90 days of the date of service.

(2) Required prior authorization for selected services. At the CSHCN Services Program's [~~program's~~] option, selected services may require authorization prior to the delivery of services in order for payment to be made. Prior authorization [~~Authorization~~] requests must be submitted prior to the date of service.

(3) (No change.)

[~~(4) Use of other benefits. The CSHCN program is the payer of last resort. The Children with Special Health Care Needs Services Act provides that any health insurance or other benefits including, but not limited to commercial health insurance, health maintenance organizations, preferred provider organizations, CHAMPUS/CHAMPVA, Medicaid or Medicaid waiver programs, CHIP, liability insurance, or worker's compensation insurance available to the client must be used prior to payment by the CSHCN program.~~]

(4) [~~(5)~~] Denied authorization requests are authorization requests which are incomplete, submitted on the wrong form, lack necessary documentation, contain inaccurate information, fail to meet authorization request submission deadlines, and/or are for ineligible persons [~~recipients~~], services, or providers, and/or are for clients who do not qualify for the health care benefit requested. Denied authorization requests may be corrected and resubmitted for reconsideration. However, authorization requests must meet authorization request submission deadlines. If the results of the reconsideration process are unsatisfactory, denied authorization requests may be appealed according to §38.13 of this title (relating to Right of Appeal).

(e) Pilot projects. The CSHCN Services Program [~~program~~] may initiate and participate in pilot projects to determine the fiscal impact of changes in eligibility criteria and the types of services provided. New projects are possible only if funds are available in the current fiscal year. All pilot projects are limited to no more than 10% of the fiscal year appropriation.

§38.5. Rights and Responsibilities of Parents/Foster Parents/Guardian/Managing Conservator or the Adult Client.

(a) Rights. The parent/foster parent/guardian/managing conservator or the adult client shall have the right to:

(1) (No change.)

(2) choose providers subject to CSHCN Services Program [~~program~~] limitations;

(3) (No change.)

(4) refuse entry into the home to any employee, agent, or representative of the commission or the department;

(5) appeal CSHCN Services Program [~~program~~] decisions and receive a response within the [~~CSHCN program-specified~~] deadline as described in §38.13 of this title (relating to Right of Appeal); and

(6) (No change.)

(b) Responsibilities. The parent/foster parent/guardian/managing conservator or adult client shall have the responsibility to:

(1) provide accurate medical information to providers and notify all providers of CSHCN Services Program [~~program~~] coverage prior to delivery of services;

(2) provide the CSHCN Services Program [~~program~~] with accurate information regarding any change of circumstance which might affect eligibility, within 30 days of such change;

(3) receive and utilize services as close to the client's home community as possible, unless CSHCN Services Program [~~program~~] contracts, policies, or a referral by a CSHCN Services Program provider requires the use of specific facilities or specialty centers;

(4) reimburse the CSHCN Services Program [~~program~~], if payments from health insurance or other benefits are made directly to the client or parent/guardian/managing conservator for services or equipment purchased by the CSHCN Services Program [~~program~~];

(5) consult with the provider regarding authorization of service from the CSHCN Services Program [~~program~~] prior to service delivery;

(6) utilize services provided by the CSHCN Services Program [~~program~~] appropriately, including keeping appointments and using supplies and equipment judiciously;

(7) (No change.)

(8) notify the CSHCN Services Program [~~program~~] of any other benefits, as defined in §38.2 of this title (relating to Definitions), available to the client at the time of application or thereafter, and any lawsuit(s) contemplated or filed concerning the cause of the medical condition for which the CSHCN Services Program [~~program~~] has paid for services; and

(9) bear a portion of the expense of medical or dental care, if deemed financially able by the CSHCN Services Program [~~program~~]. Items of routine daily living are not covered by the CSHCN Services Program [~~program~~].

(c) (No change.)

§38.6. Providers.

(a) General requirements for participation. The Children with Special Health Care Needs Services (CSHCN) Act, Health and Safety Code, §35.004, authorizes the approval of [~~Texas Board of Health to approve~~] physicians, dentists, podiatrists, dietitians, facilities, specialty centers, and other providers to participate in the CSHCN Services Program [~~program~~] according to its criteria and procedures.

(1) Providers seeking approval for CSHCN Services Program [~~program~~] participation must submit a completed application to the CSHCN Services Program [~~program~~] or its designee, including a signed provider agreement and all documents requested on the application.

(2) All approved CSHCN Services Program [~~program~~] providers must agree to abide by CSHCN Services Program [~~program~~] rules and regulations, and not to discriminate against clients based on source of payment.

(3) All CSHCN Service Program [~~program~~] providers must agree to accept the CSHCN Services Program [~~program~~] allowed amount of payment (regardless of payer) as payment in full for services provided to CSHCN Services Program clients. Providers may collect allowable insurance or health maintenance organization co-payments in accordance with those plan provisions. Providers may not request or accept payment from the client or client's family for completing any CSHCN Services Program forms.

(4) The CSHCN Services Program [~~program~~] is the payer of last resort, and CSHCN Services Program [~~program~~] providers must agree to utilize all other public or private benefits available to the client, including but not limited to Medicaid or Medicaid waiver programs, CHIP, or Medicare, and casualty or liability coverage prior to requesting payment from the CSHCN Services Program [~~program~~]. Providers [~~Program providers~~] must agree to attempt to collect payment from the payer of other benefits. The CSHCN Services Program [~~program~~] may pay for certain [~~CSHCN program~~] services for which other benefits may be available but have not been definitively determined. If other benefits become available after the CSHCN Services Program [~~program~~] has paid for the [~~program~~] services, the CSHCN Services Program [~~program~~] shall recover its costs directly from the payer of other benefits or shall request the provider of [~~CSHCN program~~] services to collect payment and reimburse the CSHCN Services Program [~~program~~].

(5) Overpayments made on behalf of clients to CSHCN Services Program [~~program~~] participating providers must be reimbursed to the CSHCN Services Program [~~program~~] refund account by lump sum payment or, at the discretion of the department, in monthly installments or out of current claims due to be paid the provider. All providers must consent to on-site visits and/or audits by CSHCN Services Program [~~program~~] staff or its designees.

(6) All CSHCN Services Program providers of [~~CSHCN program~~] services also covered by Medicaid must enroll and remain enrolled as Title XIX Medicaid providers. In order to be reimbursed by Medicaid as the primary payer, a provider must be enrolled on the date of service. The CSHCN Services Program [~~program~~] will not reimburse an enrolled provider for any service covered under Medicaid that [~~which~~] was provided to a CSHCN Services Program client eligible for Medicaid at the time of service. If a [~~CSHCN program~~] service covered by the CSHCN Services Program is not covered by Medicaid, the provider of that service is not required to enroll as a Medicaid provider. Any provider excluded by Medicaid for any reason shall be excluded by the CSHCN Services Program [~~program~~].

(7) (No change.)

(8) All providers shall be responsible for the actions of members of their staffs who provide CSHCN Services Program [~~program~~] services.

(9) Any provider may withdraw from CSHCN Services Program [~~program~~] participation at any time by so notifying the CSHCN Services Program [~~program~~] in writing.

(b) Denial, modification, suspension, and termination of provider approval.

(1) The CSHCN Services Program [~~program~~] may deny, modify, suspend, or terminate a provider's approval to participate for the following reasons:

(A) - (B) (No change.)

(C) not adhering to the provider agreement signed at the time of application or renewal for CSHCN Services Program [~~program~~] participation;

(D) - (E) (No change.)

(2) The CSHCN Services Program [~~program~~] may deny or suspend approved provider status based on the CSHCN Services Program's [~~program's~~] knowledge of disciplinary action taken against the provider by the licensing authority under which the provider practices in the State of Texas or by the Texas Medicaid Program.

(3) Prior to taking an action to deny, modify, suspend, or terminate the approval of a provider, the CSHCN Services Program [~~program~~] shall give the provider written notice of an opportunity of appeal in accordance with §38.13 of this title (relating to Right of Appeal). In addition, a fair hearing is available to any provider for the resolution of conflict between the CSHCN Services Program [~~program~~] and the provider.

(c) Provider types. Approved providers include, but are not limited to:

(1) - (3) (No change.)

(4) mental/behavioral health professionals, including psychiatrists, licensed psychologists, licensed clinical social workers [~~master level social worker-advanced clinical practitioners~~], licensed marriage and family therapists, and licensed professional counselors;

(5) - (24) (No change.)

(d) Requirements for specialty centers.

(1) The CSHCN Services Program [~~program~~] may accept as participating providers diagnostically specific specialty centers, such as bone marrow or other transplant centers, approved under the credentialing and/or approval standards and processes of the Texas Medicaid Program, if such specialty centers also submit a CSHCN Services Program provider enrollment application.

(2) Other specialty center standards. The CSHCN Services Program [~~program~~] may establish standards to insure quality of care for children with special health care needs in the comprehensive diagnosis and treatment of specific medical conditions for specialty centers with Texas Medicaid Program separate credentialing standards as well as other specialty centers for which the Texas Medicaid Program has not established separate credentialing or approval standards for providers.

(e) Out-of-state coverage.

(1) Fifty or fewer [~~Within 50~~] miles from the Texas state border. For clients [~~Clients~~] who would otherwise experience financial hardship or be subject to clear medical risk, the CSHCN Services Program may cover services that are within the scope of the program and provided by health care providers [~~may be transported to medical facilities~~] in New Mexico, Oklahoma, Arkansas, or Louisiana located [~~within~~] 50 or fewer miles from [~~of~~] the Texas state border. [~~All CSHCN program policies and procedures will apply, including the requirement that all providers be Medicaid and CSHCN program participating providers.~~]

(2) More than [~~Outside~~] 50 miles from [~~of~~] the Texas state border. The manager of the department unit having responsibility for oversight of the CSHCN Services Program [~~commissioner of health~~] may approve coverage of services that are within the scope of the CSHCN Services Program and provided by health care providers located within the United States and more than 50 miles from the Texas border [~~CSHCN program payment to out-of-state providers~~] in unique circumstances in which the CSHCN Services Program [~~program~~] participating physician(s), the client, parent or guardian, and the CSHCN Services Program medical director agree that:

(A) (No change.)

(B) the medical literature indicates that the out-of-state treatment is accepted medical practice and is anticipated to improve the client's quality of life;

(C) [~~(B)~~] the same treatment or another treatment of equal benefit or cost is not available from Texas CSHCN Services Program providers; and

(D) [~~(C)~~] the out-of-state treatment should result in a decrease in the total projected CSHCN Services Program [~~program~~] cost of the client's treatment.

(3) The limitations of this paragraph do not apply to coverage for or payment to CSHCN Services Program providers of selected products or devices including, but not limited to, medical foods or hearing amplification devices, which either are always less costly and/or are only available, from out-of-state sources.

(4) For CSHCN Services Program reimbursement, all program policies and procedures will apply, including the requirement that all providers be CSHCN Services Program participating providers, as defined by this section.

[~~(3) The medical literature must indicate that the out-of-state treatment is accepted medical practice and is anticipated to improve the patient's quality of life.~~]

(5) [~~(4)~~] The CSHCN Services Program may cover costs of transportation and associated meals and lodging for a client and, if necessary, a responsible adult for travel to and from the location of out-of-state services that meet the program approval parameters above. [~~The cost of transportation, meals, and lodging may be reimbursed for the CSHCN approved out-of-state treatment.~~] Travel costs will be negotiated, with approval of specific travel options based on overall cost effectiveness.

§38.7. Ambulatory Surgical Care Facilities.

(a) Ambulatory surgery services may be utilized by the CSHCN Services Program [~~program~~] as a cost-efficient means of providing surgical care, as long as quality of care is assured. Any hospital participating in the CSHCN Services Program [~~program~~] whose accreditation by the Joint Commission on Accreditation of Health Care Organizations includes hospital-sponsored ambulatory care services may provide ambulatory surgery services for CSHCN Services Program clients. Freestanding ambulatory surgical care (ASC) facilities, even if governed by or affiliated with a hospital participating in the CSHCN Services Program [~~program~~], must apply for CSHCN Services Program [~~program~~] approval. The CSHCN Services Program [~~program~~] may contract with a limited number of facilities to contain [~~program~~] costs. For approval to participate in the CSHCN Services Program [~~program~~], a freestanding ASC facility must meet the following criteria:

(1) - (3) (No change.)

(4) Staff requirements.

(A) Surgical staff participating in the CSHCN Services Program [~~program~~] must perform all surgical procedures.

(B) An anesthesiologist or certified registered nurse anesthetist participating in the CSHCN Services Program [~~program~~] must be present in the operating room for the induction and completion of anesthesia and must remain on the premises (immediately available) during the surgical procedure until the client leaves the facility.

(C) (No change.)

(5) (No change.)

(6) Client transfer. The facility must have client transfer agreements with CSHCN Services Program [~~program~~] participating hospitals in the area.

(b) ASC facilities seeking approval for CSHCN Services Program [~~program~~] participation must submit documentation concerning their compliance with the criteria stated in subsection (a)(1) - (6) of this section to the CSHCN Services Program [~~program~~] or its designee as required by the application process described in subsection (d) of this section.

(c) CSHCN Services Program reimbursement for care at free-standing ASC facilities shall be limited to:

(1) - (2) (No change.)

(d) Applications for approval for CSHCN Services Program [~~program~~] participation shall be processed according to the following procedures:

(1) Applications will be reviewed by the CSHCN Services Program [~~program~~] to assure that:

(A) - (B) (No change.)

(C) copies of documents have been provided verifying the facility's state licensure, Medicare certification, and client transfer agreements with CSHCN Services Program [~~program~~] participating hospitals.

(2) The CSHCN Services Program [~~program~~] shall review all complete applications and shall approve or deny each application in writing within 15 working days of receipt. An incomplete application will be returned to the applicant with an explanation of the information required. The application may be resubmitted with the required documentation for reconsideration.

(3) (No change.)

(e) Those providers that have not received any CSHCN Services Program [~~program~~] payment for services rendered during the prior year will be given the option of withdrawing from CSHCN Services Program [~~program~~] approved status, becoming inactive, or providing updated information to remain active. If updated information is not received within 60 days of the date of notification, the provider will be considered inactive. This action will not terminate a provider's approval, but the provider may be reinstated to active status only by providing current information to the CSHCN Services Program [~~program~~].

(1) Updated information may include, but is not limited to, the following:

(A) (No change.)

(B) current listing of CSHCN Services Program [~~program~~] participating medical staff;

(C) - (D) (No change.)

(2) The provider will be given a current copy of CSHCN Services Program [~~program~~] rules to review at the time reinstatement is requested.

§38.8. Inpatient Rehabilitation Centers.

(a) Introduction. The CSHCN Services Program [~~program~~] shall reimburse only an approved inpatient rehabilitation center for services provided to clients.

(b) Criteria. The criteria for inpatient rehabilitation center approval include the following.

(1) - (2) (No change.)

(3) The center shall agree to allow on-site visits and/or audit privileges to the CSHCN Services Program [~~program~~] staff.

(4) A physician who is a CSHCN Services Program [~~program~~] participating provider, board certified or eligible in his/her specialty, and able to demonstrate experience in rehabilitation shall be available as medical director.

(5) A center which serves pediatric clients (clients less than 14 years old), shall have a designated CSHCN Services Program [~~program~~] participating pediatrician available to participate in direct client care and consultation. The physician shall be either certified or eligible for certification by the American Board of Pediatrics.

(6) - (7) (No change.)

(8) A center that [~~which~~] serves pediatric clients shall have at least one recreational area or playroom that is bed and wheelchair accessible, with age-appropriate and safe materials for clients who are at different stages in rehabilitation [~~which is bed and wheelchair accessible~~].

(9) A center that [~~which~~] serves pediatric clients shall have specialized age-appropriate equipment necessary for provision of care.

(10) (No change.)

§38.9. Cleft/Craniofacial Center Teams.

To assure that clients with craniofacial anomalies, including cleft lip and/or cleft palate, receive quality, comprehensive services, cleft/craniofacial (C/C) teams requesting approval from the CSHCN Services Program [~~program~~] shall comply with the following standards:

(1) Approval process. All C/C teams and affiliated providers must submit a completed CSHCN Services Program C/C provider application packet as specified by the CSHCN Services Program [~~program~~]. Applications shall include an application form, CSHCN Services Program provider agreements, documentation of licensure, board certifications for physicians, documentation of dental specialty for dentists, and a description of the C/C team composition.

(2) C/C team administrator responsibility.

(A) The C/C team shall clearly identify an administrator who is responsible for coordinating and maintaining all records associated with C/C team activities and assuring that the C/C team abides by the CSHCN Services Program [~~program~~] rules and regulations.

(B) (No change.)

(3) - (4) (No change.)

(5) Affiliated providers.

(A) To facilitate statewide coverage, providers may be approved as C/C team members when affiliated with an approved C/C team. Affiliated providers must meet the CSHCN Services Program [~~program~~] provider enrollment requirements found in §38.6 of this title (relating to Providers).

(B) (No change.)

(C) As part of its application, an affiliated provider must specify the comprehensive C/C team(s) with which it is linked. A letter of agreement between the affiliated provider and the C/C team that [~~which~~] verifies the linkage and specifies the method of communication and consultation must accompany the application.

§38.10. Payment of Services.

The CSHCN Services Program [~~program~~] reimburses participating providers for covered services for [~~CSHCN~~] clients. Payment may be made only after the delivery of the service, with the exception of meals, transportation, and lodging and insurance premium payments. Excluding allowable insurance or health maintenance organization co-payments, the client or client's family must not be billed for the service or be required to make a preadmission or pretreatment payment or deposit. Providers may not request or accept payment from the client or the client's family for completing any CSHCN Services Program forms. Providers must agree to accept established fees as payment in full. The program may negotiate reimbursement alternatives to reduce costs through requests for proposals, contract purchases, and/or incentive programs.

(1) Payment or denial of claims. All payments made on behalf of a client will be for claims received by the CSHCN Services Program [~~program~~] or its payment contractor within 95 days of the date of service, within 95 days from the date of discharge from inpatient hospital and inpatient rehabilitation facilities, within 95 days from the date the client's eligibility is added to program automation systems, or within the submission deadlines listed in paragraphs (1)(B)(ii) and (2) of this section, whichever is later. If the 95th day for receipt of a claim falls on a weekend or holiday, the deadline shall be extended to the next business day following the weekend or holiday. Claims will either be paid or denied within 30 days. The manager of the department unit having responsibility for oversight of the CSHCN Services Program [~~CSHCN Division Director~~] or his/her designee(s) may waive the filing deadlines according to the conditions and circumstances specified in paragraphs (3) - (5) of this section. A claim must be processed and paid within 24 months of the date of service. Claims received by the CSHCN Services Program [~~program~~] or its payment contractor after this time frame will not be considered for payment by the CSHCN Services Program [~~program~~].

(A) Claims will be paid, if submitted on claim forms approved by the CSHCN Services Program [~~the CSHCN program-approved claim form~~] (including electronic claims submission systems), and if the required documentation is received with the claim.

(B) Denied claims are claims which are incomplete, submitted on the wrong form, lack necessary documentation, contain inaccurate information, fail to meet the filing deadline, [~~and/or~~] are for ineligible persons [~~recipients~~], services, or providers, and/or are for clients who do not qualify for the health care benefit claimed.

(i) Corrected claims must be submitted on claim forms approved by the CSHCN Services Program, [~~the CSHCN program-approved claim form~~] along with required documentation, within the filing deadline established in clause (ii) of this subparagraph.

(ii) (No change.)

(2) Claims involving health insurance coverage, CHIP or Medicaid. Any health insurance that provides coverage to the client must be utilized before the CSHCN Services Program [~~program~~] can pay for services. Providers must file a claim with health insurance, CHIP, or Medicaid prior to submitting any claim to the CSHCN Services Program [~~program~~] for payment. Claims with health insurance must be received by the CSHCN Services Program [~~program~~] within 95 days of the date of disposition by the other third party resource, and no later than 365 days from the date of service. The CSHCN Services Program [~~program~~] will consider claims received for the first time after the 365-day deadline, if a third party resource recoups a payment made in error; however, the claim must be received by the CSHCN Services Program [~~program~~] within 95 days from the third party's disposition. The CSHCN Services Program may pay for covered health care benefits during CHIP or other health insurance enrollment waiting periods. During these periods, providers may file claims directly with the CSHCN Services Program without evidence of denial by the other insurer.

(A) Health insurance denial or nonresponse. If a claim is denied by health insurance, the provider may bill the CSHCN Services Program [~~program~~], if the letter of denial also is submitted with the claim form. If the denial letter is not available, the provider must include on the claim form the date the claim was filed with the insurance company, the reason for the denial, name and telephone number of the insurance company, the policy number, the name of the policy holder and identification numbers for each policy covering the client, the name of the insurance company employee who provided the information on the denial of benefits, and the date of the contact. If more than 110 days have elapsed from the date a claim was filed with the third party resource and no response has been received, the claim may be submitted to the CSHCN Services Program [~~program~~] for consideration of payment. Claims must be submitted with documentation indicating the third party resource has not responded.

(B) Explanation of benefits (EOB). The health insurance EOB must accompany any claim sent to the CSHCN Services Program [~~program~~] for payment, if available. If the EOB is unavailable, the provider must include on the claim form the name and telephone number of the insurance company, the amount paid, the policy number, and name of the insured for each policy covering the client.

(C) Late filing. Claims denied by health insurance on the basis of late filing will not be considered for payment by the CSHCN Services Program [~~program~~].

(D) Deductibles and coinsurance. If the client has other third party coverage, the CSHCN Services Program [~~program~~] may pay a deductible or coinsurance for the client as long as the total amount paid to the provider does not exceed the maximum allowed for the covered service, and conforms with current CSHCN Services Program [~~program~~] policies regarding third party resources, deductible, and coinsurance.

(3) Exceptions to the claim receipt or correction and resubmission deadlines. The manager of the department unit having responsibility for oversight of the CSHCN Services Program [~~CSHCN Division Director~~] or his/her designee(s) will consider a provider's request for an exception to the claim receipt or correction and resubmission deadlines provided in paragraphs (1) and (2) of this section, if the delay in claim receipt or correction and resubmission is due to one of the following reasons:

(A) - (B) (No change.)

(C) delay or error or constraint imposed by the program in the eligibility determination of a client [~~recipient~~] and/or in claims processing, or delay due to erroneous written information from the program or its designee, or another state agency; or

(D) (No change.)

(4) (No change.)

(5) Other exceptions to claims receipt or correction and resubmission deadlines. The manager of the department unit having responsibility for oversight of the CSHCN Services Program [~~CSHCN Division Director~~] or his/her designee(s) will consider a provider's request for an exception to claims receipt or correction and resubmission deadlines due to delays caused by entities other than the provider and the program under the following circumstances:

(A) - (D) (No change.)

(6) CSHCN Services Program [~~program~~] fee schedules. The CSHCN Services Program [~~program~~] or its designee shall reimburse claims for covered medical, dental, and other services according to the following fee schedules:

(A) - (D) (No change.)

(E) nutritional products--the lower of the billed amount or the Average Wholesale Price (AWP) per unit according to the prices in the current edition of the Drug Topics Red Book, published by Medical Economics Company, Inc., Montvale, New Jersey 07645-1742, on file with the CSHCN Services Program [~~program~~]. For products not listed in the current edition of the Drug Topics Red Book, reimbursement shall be based on the same methodology using the AWP supplied by the manufacturer of the product;

(F) (No change.)

(G) medical foods--the lower of the billed amount, the manufacturer's suggested retail price (MSRP), or the maximum charge allowed by the Texas Medicaid Program up to a maximum of $200 per client per month;

(H) [~~(G)~~] out-patient medications:

(i) medications covered by Medicaid when billed by pharmacies--the same drug costs and dispensing fees allowed by the Texas Medicaid Vendor Drug Program;

(ii) medications not covered by Medicaid when billed by pharmacies--the lower of the billed amount or the drug cost available through the database used by the Texas Medicaid Vendor Drug Program plus the same dispensing fees allowed by the Texas Medicaid Vendor Drug Program;

(iii) medications covered by Medicaid when billed by hospitals--(the lower of the billed amount or the drug cost available through the database used by the Texas Medicaid Vendor Drug Program plus $2.28)/0.970; and

(iv) hemophilia blood factor products--the lower of the billed price or the United States Public Health Service (USPHS) price in effect on the date of service plus a dispensing fee of $.04 per unit of factor;

(I) [~~(H)~~] expendable medical supplies--the lower of the billed amount or the maximum amount allowed [~~allowable by the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), if available, or~~] by the Texas Medicaid Program;

(J) durable medical equipment--provided by enrolled home health agencies and durable medical equipment providers, the lower of the billed amount or the maximum allowable fee for durable medical equipment established by the Texas Medicaid Program. If the Texas Medicaid program has not established a maximum fee, then reimbursement will be the least of the following:

(i) the billed amount; or

(ii) the Medicare fee schedule as defined in 25 Texas Administrative Code, §29.301; or

(iii) the Manufacturer's Suggested Retail Price (MSRP) minus a discount as established by the Texas Medicaid Program; or if no MSRP exists, the incurred cost to the dealer plus a percentage as determined by the Texas Medicaid Program;

[~~(I) durable medical equipment:~~]

[~~(i)~~ ~~non-customized--the lower of the billed amount or the amount allowable by the CMS, if available, or the Texas Medicaid Program;~~]

[~~(ii)~~ ~~customized:~~]

[~~(I)~~ ~~customized, non-powered equipment--the lower of the billed amount or the manufacturer's suggested retail price (MSRP) less 18%;~~]

[~~(II)~~ ~~power wheelchairs--the lower of the billed amount or the MSRP less 15%; and~~]

[~~(III)~~ ~~other--when no MSRP has been published, the lower of the billed amount or the dealer's cost plus 25%; and~~]

[~~(IV)~~ ~~delayed delivery penalty--a claim submitted for customized durable medical equipment that was delivered to the client more than 75 days after the authorization date shall be reduced by 10%;~~]

[~~(iii)~~ ~~orthotics and prosthetics--the lower of the billed amount or the amount allowed by the CMS, if available, or the Texas Medicaid Program;~~]

(K) orthotics and prosthetics--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;

(L) [~~(J)~~] total parenteral nutrition/hyperalimentation (including equipment, supplies and related services)--the lower of the billed amount or the maximum amount allowed by the Texas Medicaid Program;

(M) [~~(K)~~] home health nursing services (provided only through CSHCN Services Program [~~program~~] participating home and community support service agencies)--reimbursement for a maximum of 200 hours per client per calendar year, with an additional 200 hours per client per calendar year available, if justification of need and cost effectiveness are documented;

(i) services provided by a registered nurse--the lower of the billed amount or $36 per hour;

(ii) services provided by a licensed vocational nurse--the lower of the billed amount or $28 per hour; and

(iii) services provided by a home health aide or home health medication aide (including those legally delegated by a supervising registered nurse)--the lower of the billed amount or $12 per hour;

(N) [~~(L)~~] outpatient physical therapy, occupational therapy, speech-language pathology, and respiratory therapy:

(i) services provided by therapists other than physicians--the lower of the billed amount or the amount allowed by the Texas Medicaid Program; and

(ii) services provided by physicians--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;

(O) audiological testing and amplification devices--the lower of the billed amount or the amount allowed by the Program for Amplification for Children of Texas (PACT);

[~~(M) audiological testing and amplification devices:~~]

[~~(i)~~ ~~for clients under age 21--payment is made through the Program for Amplification for Children of Texas (PACT); and~~]

[(ii) for clients ineligible for PACT and those age 21 and over--the lower of the billed amount or the amount allowed by PACT;]

(P) [(N)] insurance premium payment assistance program--the lowest available premium for a plan which covers the client, if cost-effective;

(Q) [(O)] hospital (inpatient and outpatient care) and inpatient psychiatric care--reimbursed at 80% of the rate authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), which is equivalent to the hospital's Medicaid interim rate;

(R) [(P)] inpatient rehabilitation care--reimbursed at 80% of TEFRA rates, for a maximum of 90 inpatient days per calendar year;

(S) [(Q)] hospice services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;

(T) [(R)] care for renal disease--

(i) renal dialysis services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program; and/or

(ii) renal transplant services--renal transplants may be covered if the projected cost for the transplant and follow-up care is less than that of continuing renal dialysis. Negotiated coverage and cost are based on prior authorization documentation of cost effectiveness;

(U) [(S)] freestanding ambulatory surgical centers--the lower of the billed amount or the amount allowed by the Texas Medicaid Program based upon Ambulatory Surgical Code Groupings approved by the Centers for Medicare and Medicaid Services (CMS) [CMS] and the Department of State Health Services [Texas Department of Health];

(V) [(T)] hospital ambulatory surgical centers--the lower of the amount billed or the amount allowed by the Texas Medicaid Program based upon Ambulatory Surgical Code Groupings approved by the CMS and the Department of State Health Services [Texas Department of Health];

(W) [(U)] covered professional services by physicians, podiatrists, advanced practice nurses, psychologists, licensed professional counselors, or other providers that are not otherwise specified--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;

(X) [(V)] independent laboratory--the lower of the billed amount or the maximum amount allowed by the Texas Medicaid Program; [the lowest of the following:]

[(i) the amount allowed by the Texas Medicaid Program state fee schedule;]

[(ii) the amount allowed by the CMS national fee schedule; or]

[(iii) the billed amount;]

(Y) [(W)] radiology services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program [program];

(Z) [(X)] dental services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program [program]; and

(AA) [(Y)] vision services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program, except high-powered lenses, which are reimbursed at the manufacturer's suggested retail price less 18%;

(7) Required documentation. The CSHCN Services Program [program] may require documentation of the delivery of goods and services from the provider.

(8) Overpayments.

(A) Overpayments are payments made by the CSHCN Services Program [program] due to the following:

(i) - (iii) (No change.)

(iv) services disallowed by the CSHCN Services Program [program]; and

(v) (No change.)

(B) (No change.)

§38.11. Contracts, Written Agreements, and Donations.

The CSHCN Services Program [program] may contract on a bid basis for treatment, equipment, medications, supplies, program operations and other services in order to conserve funds and administer the program effectively.

(1) The CSHCN Services Program [program] may enter into contracts or written agreements with persons or entities for the development and improvement of program standards and services.

(2) The CSHCN Services Program [program] may use consultants from any medical or dental specialty or other discipline to address specific issues and problems in relation to the identification, diagnosis and evaluation, rehabilitation, case management, other family support services, and health benefits coverage for clients.

(3) With [the] approval [of the board] as required by law, the CSHCN Services Program [program] may accept gifts and donations.

§38.12. Denial/Modification/Suspension/Termination of Eligibility for Health Care Benefits and/or Health Care Benefits.

(a) Any person applying for or receiving health care benefits from the CSHCN Services Program [program] shall be notified in writing if the CSHCN Services Program [program] proposes to deny, modify, suspend, or terminate such health care benefits because:

(1) - (7) (No change.)

(8) utilization review indicates inappropriate use of CSHCN Services Program [program] services and the client/family fails to adhere to a plan established to direct and/or supervise the use of CSHCN Services Program [program] services;

(9) CSHCN Services Program [program] funds are reduced or curtailed; or

(10) the client is placed on a waiting list for CSHCN Services Program [program] health care benefits.

(b) The CSHCN Services Program [program] will notify the parent/foster parent/guardian/managing conservator or the adult applicant/client in writing of the action, the reasons for the action, and the right of appeal in accordance with §38.13 of this title (relating to Right of Appeal).

§38.13. Right of Appeal.

(a) Appeal procedures for families who request authorization of family support services and/or providers.

(1) Administrative review.

(A) If the CSHCN Services Program [program] intends to deny a family's authorization request for family support services

according to §38.4(b)(5) [§38.4(b)(5)(B)(viii)] of this title (relating to Covered Services) and/or a provider's authorization request according to §38.4(d) [§38.4(d)(5)] of this title [(relating to Covered Services)] and/or a provider's claim that has been corrected and resubmitted for reconsideration according to §38.10(1)(B) [§38.10(1)(B)(ii)] of this title (relating to Payment of Services), the program shall give the family or provider written notice of the denial and the right of the family or provider to request an administrative review of the denial within 30 days.

(B) If the CSHCN Services Program [program] intends to deny, modify, suspend, or terminate an individual provider's participation in the CSHCN Services Program [program], the CSHCN Services Program [program] shall give the provider written notice of the proposed action and the provider's right to request an administrative review of the proposed action within 30 days.

(C) If the family or provider does not respond in writing within the 30-day period, the family or provider is presumed to have waived the administrative review as well as access to a fair hearing, and the CSHCN Services Program's [program's] action is final. If the family or provider so requests, the CSHCN Services Program [program] will conduct an administrative review of the circumstances on which the proposed denial of the authorization request/claim and/or the proposed denial, modification, suspension, or termination of provider program participation is based and give the family or provider written notice of the program decision and the supporting reasons within ten days of receipt of the request for administrative review.

(D) The commission [department] establishes provider reimbursement [fee schedules] and the program's budget alignment methodologies [methodology] by rule. Families and/or providers may not request administrative review and may not appeal service authorization decisions and/or provider reimbursement amounts that are in accordance with the reimbursement [fee schedules] and budget alignment methodologies [methodology] as stated in CSHCN Services Program [program] rules.

(2) Fair hearing. If the family and/or provider is dissatisfied with the CSHCN Services Program's [program's] decision and supporting reasons following the administrative review, the family and/or provider may request a fair hearing in writing addressed to the Children with Special Health Care Needs Program, Purchased Health Services Unit, Department of State Health Services [Bureau of Children's Health, Texas Department of Health], 1100 West [W.] 49th Street, Austin, Texas 78756 within 20 days of receipt of the administrative review decision notice. If the family and/or provider fails to request a fair hearing within the 20-day period, the family and/or provider is presumed to have waived the request for a fair hearing, and the CSHCN Services Program [program] may take final action. A fair hearing requested by a family and/or provider shall be conducted in accordance with §§1.51 - 1.55 of this title (relating to Fair Hearing Procedures).

(b) Appeal procedures for applicants/clients.

(1) Administrative review.

(A) If the CSHCN Services Program [program] intends to deny eligibility to a program applicant, the program shall give the applicant written notice of the denial and the applicant's right to request an administrative review of the denial within 30 days.

(B) If the CSHCN Services Program [program] intends to deny, modify, suspend, or terminate an individual client's eligibility for health care benefits and/or health care benefits (unless such program actions are authorized by §38.16 of this title (relating to Procedures to Address CSHCN Services Program [program] Budget Alignment)), the CSHCN Services Program [program] shall give the client written notice of the proposed action and the client's right to request an administrative review of the proposed action within 30 days.

(C) If the applicant/client does not respond in writing within the 30-day period, the applicant/client is presumed to have waived the administrative review as well as access to a fair hearing, and the CSHCN Services Program's [program's] action is final. If the applicant/client so requests in writing, the CSHCN Services Program [program] shall conduct an administrative review concerning the circumstances on which the denial of the applicant's eligibility or the proposed denial, modification, suspension, or termination of the client's eligibility and/or health care benefits is based within ten days after receiving the request and shall give the client written notice of the decision and the supporting reasons.

(2) Fair hearing. If the applicant/client is dissatisfied with the CSHCN Services Program's [program's] decision and supporting reasons following the administrative review, the applicant/client may request a fair hearing in writing addressed to the Children with Special Health Care Needs Program, Purchased Health Services Unit, Department of State Health Services [Bureau of Children's Health, Texas Department of Health], 1100 West 49th Street, Austin, Texas 78756 within 20 days of receipt of the administrative review decision notice. If the applicant/client fails to request a fair hearing within the 20-day period, the applicant/client is presumed to have waived the request for a fair hearing, and the CSHCN Services Program [program] may take final action. A fair hearing requested by the applicant/client shall be conducted in accordance with §§1.51 - 1.55 of this title [(relating to Fair Hearing Procedures)].

§38.14. Development and Improvement of Standards and Services.

To ensure that cost-effective, quality, appropriate medical and related services are available and delivered to clients, the CSHCN Services Program [program] may establish a system of program evaluation to obtain management information about the CSHCN Services Program's [program's] operation and effectiveness; to establish guidelines and standards for CSHCN Services Program [program] health care services; to monitor compliance with these established standards and guidelines; to identify and analyze patterns and trends in provider billing and service delivery; and to develop systems which promote family-centered, community-based alternatives that nurture and support children with special health care needs.

(1) Quality assurance. The CSHCN Services Program [program] may establish a system of monitoring the quality, medical necessity, and effectiveness of services.

(A) Standards and guidelines. The CSHCN Services Program [program] may develop standards and guidelines for services and providers reimbursed by the CSHCN Services Program [program] to ensure that quality services are available.

(B) Review of services. The CSHCN Services Program [program] may conduct or contract for concurrent and/or retrospective review of client care services reimbursed by the CSHCN Services Program [program].

(C) Provider review. The CSHCN Services Program [program] may conduct periodic quality assurance reviews for provider services.

(D) Survey of clients and families. The CSHCN Services Program [program] shall survey clients periodically to assess the availability, appropriateness, effectiveness, accessibility, and cultural sensitivity of provided services.

(2) Utilization review. Utilization review will assess the appropriateness of services provided to CSHCN Services Program

[~~program~~] clients by monitoring systems developed or contracted by the CSHCN Services Program [~~program~~]. Suspected fraud and abuse cases will be evaluated by the Office of the General Counsel for possible prosecution.

(3) Task forces. The CSHCN Services Program [~~program~~] may establish task forces to advise the CSHCN Services Program [~~program~~].

(4) Cooperation with other agencies. The department cooperates with public and private agencies and with persons interested in the welfare of children with special health care needs. The CSHCN Services Program [~~program~~] will make every effort to establish cooperative agreements with other state agencies to define the responsibilities of each agency in relation to specific programs to avoid duplication of services.

(5) Collaboration with stakeholders. The CSHCN Services Program [~~program~~] values the participation of all stakeholders who have an interest in children with special health care needs and will make every effort to work collaboratively with stakeholders in the design, development, and implementation of program rules and policies.

(6) Systems development activities. The CSHCN Services Program [~~program~~] may conduct population-based systems development activities to improve and support the state's infrastructure for serving all children with special health care needs and their families by program staff or through contractors.

(A) (No change.)

(B) The CSHCN Services Program [~~program~~] may establish wellness centers, which are programs and/or physical locations of community-based service organizations which provide specific support services for children with special health care needs and their families.

(i) Community-based service organizations that serve as wellness centers may include, but are not limited to: hospitals, churches, boys/girls organizations, health centers, or school-based centers. Existing community-based service organizations that provide services to children with special health care needs and their families within a community shall receive preference in funding by the CSHCN Services Program [~~program~~].

(ii) - (iii) (No change.)

§38.16. Procedures to Address CSHCN Services Program [~~Program~~] Budget Alignment.

(a) The department shall analyze actuarial cost projections concerning CSHCN Services Program administrative and client services to estimate the amount of funds needed in the fiscal year by the program to serve CSHCN Services Program clients and shall monitor such program cost projections and funding analyses at least monthly to determine whether the estimated amount of funds needed by the program will:

(1) - (2) (No change.)

(b) When the CSHCN Services Program [~~program~~] projects that the estimated amount of funds needed in the fiscal year by the program to serve CSHCN Services Program clients will exceed the program's appropriated funds and other available resources for the fiscal year, the program shall use the following methodology to reduce/limit the amount of funds to be expended by the program:

(1) (No change.)

(2) take the following actions in the order listed only until the projected amount of funds to be expended by the program approximately equals, but does not exceed, the program's appropriated funds and other available resources:

(A) implement administrative efficiencies, while avoiding changes which may jeopardize the quality and integrity of CSHCN Services Program [~~program~~] service delivery;

(B) (No change.)

(C) at the same time the waiting list is established:

(i) provide only limited prior authorization for family support services for ongoing clients, as determined by the medical director or other designated medical staff, only in order to continue services already being provided at the time the waiting list is established, and/or when the specific services are required to prevent out-of-home placement of the client (as documented by the CSHCN Services Program [~~program~~] regional case management staff/contractors), and/or when the provision of such services is cost effective for the program;

(ii) - (iii) (No change.)

(D) - (E) (No change.)

(F) place clients who are eligible to receive CSHCN Services Program [~~program~~] health care benefits and who currently are not on the waiting list (ongoing clients for health care benefits) on the waiting list. These clients will be ordered on the waiting list according to the original date/time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits, and in the following order of movement to the waiting list:

(i) ongoing clients for health care benefits who have one or more sources of substantial health insurance coverage (such as Medicaid/CHIP/ or other private health insurance similar in scope) in addition to the CSHCN Services Program [~~program~~] (not including those ongoing clients for whom the CSHCN Services Program [~~program~~] pays the insurance premiums);

(ii) - (iii) (No change.)

(G) employ additional measures to reduce/limit the amount of funds to be expended by the program as directed [~~the board shall direct~~] by rule.

(c) If the procedures described in subsection (b)(2)(A) - (F) of this section enable the program to project that the estimated amount of funds to be expended by the program in the fiscal year approximately equals, but does not exceed, the program's appropriated funds and other available resources, the program shall take the following additional steps in order to provide health care benefits to as many clients with urgent need for health care benefits as possible who are currently on the waiting list.

(1) generate cost savings by taking the following steps in the order listed:

(A) - (B) (No change.)

(C) employ additional measures to generate cost savings as directed [~~the board shall direct~~] by rule.

(2) (No change.)

(3) provide health care benefits (which may or may not include coverage [~~payment~~] of outstanding bills for health care benefits) for clients with urgent need for health care benefits who are removed from the waiting list;

(A) - (B) (No change.)

(4) provide limited health care benefits and/or payment of outstanding bills for health care benefits for clients with urgent need

for health care benefits who are on the waiting list and remain on the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. If limited health care benefits coverage includes coverage of family support services, the coverage of family support services must be limited according to the parameters set forth in subsection (b)(2)(C)(i) of this section. Clients with urgent need for health care benefits who are on the waiting list will be served in the same order used in paragraph (2) of this subsection to remove clients with urgent need for health care benefits from the waiting list. This coverage may be provided to clients with urgent need on the waiting list prior to or at any point during activities described by paragraphs (2) - (3) of this subsection only:

(A) - (C) (No change.)

(d) When the CSHCN Services Program [~~program~~] projects that the estimated amount of funds to be expended by the program in the fiscal year is less than the program's appropriated funds and other available resources due to the cost reduction, limitation, or deferral procedures implemented according to subsections (b) or (c) of this section, or the program's receipt of additional funding, or funding analysis [~~as described in subsection (a)(2) of this section,~~] resulting in a projected amount of unobligated funds, the program shall increase the amount of funds to be expended by the program.

(1) In an effort to expend unobligated funds (except for unobligated funds resulting from program actions taken according to subsection (c) of this section) the program shall utilize the following steps in the order listed only until the program projects that the estimated amount of unobligated funds will be expended by the program during the fiscal year:

(A) take clients off the waiting list according to the original date/time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits and in the following group order:

(i) - (ii) (No change.)

~~*[(iii)* clients who are less than 21 years old who do not have an urgent need for health care benefits and who are clients who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list or who are new clients who are re-applicants for health care benefits and who have had a lapse in eligibility for no longer than the 12 months prior to the date/time that starts their latest uninterrupted sequence of eligibility;]~~

~~*[(iv)* clients who are 21 years of age or older who do not have an urgent need for health care benefits and who are clients who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list or who are new clients who are re-applicants for health care benefits and who have had a lapse in eligibility for no longer than the 12 months prior to the date/time that starts their latest uninterrupted sequence of eligibility;]~~

(iii) [~~(v)~~] all other clients who are less than 21 years old who do not have an urgent need for health care benefits; and

(iv) [~~(vi)~~] all other clients who are 21 years of age or older who do not have an urgent need for health care benefits; [~~.~~]

(B) provide health care benefits [~~(which may include payment of outstanding bills for health care benefits)~~] for clients taken off the waiting list as long as program unobligated funds are available; [~~:~~]

~~*[(i)* as long as program unobligated funds are available; and]~~

~~*[(ii)* if the outstanding bills for health care benefits are for dates of service that are within the time period that program unobligated funds are available and provided the client was eligible for program health care benefits at the time of the dates of service;]~~

(C) provide limited health care benefits for clients who are on the waiting list and remain on the waiting list; and/or payment of outstanding bills for health care benefits for clients who are on the waiting list and remain on the waiting list; and/or payment of outstanding bills for health care benefits for clients who have been taken off the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. If limited health care benefits coverage includes coverage of family support services, the coverage of family support services must be limited according to the parameters set forth in paragraph (b)(2)(C)(i) of this section. [~~Clients on the waiting list will be served in the same order used in paragraph (1) of this subsection to take clients off the waiting list.~~] This coverage may be provided [~~to clients on the waiting list prior to or~~] at any point during activities described by subparagraphs (A) and (B) of this paragraph [~~paragraphs (1) - (2) of this subsection~~] only:

(i) - (iii) (No change.)

(D) if the CSHCN Services Program [~~program~~] projects that the amount of funds to be expended by the program in the fiscal year will be less than the program's appropriated funds and other available resources after no clients eligible for CSHCN Services Program [~~program~~] health care benefits remain on the waiting list, the program may take the following actions in the following order:

(i) - (ii) (No change.)

(iii) remove any of the additional measures taken to reduce/limit the amount of funds to be expended by the program as directed [~~by the board~~] by rule;

(iv) - (v) (No change.)

(2) In an effort to expend unobligated funds resulting from program actions taken according to subsection (c) of this section (unobligated cost savings funds that remain after all clients with urgent need for health care benefits have been removed from the waiting list and provided health care benefits) the program shall utilize the following steps in the order listed only until the program projects that the estimated amount of unobligated funds will be expended by the program during the fiscal year:

(A) (No change.)

(B) provide health care benefits (which may or may not include coverage [~~payment~~] of outstanding bills for health care benefits) as stipulated in paragraph (1)(B) of this subsection [~~subsection (d)(1)(B) of this section~~] for these clients taken off the waiting list;

(C) provide limited health care benefits for clients identified in subparagraph (A)(i) and (ii) of this paragraph who are on the waiting list and remain on the waiting list; and/or payment of outstanding bills for health care benefits for clients identified in subparagraph (A)(i) and (ii) of this paragraph [~~subsections (d)(2)(A)(i) and (ii) of this section~~] who are on the waiting list and remain on the waiting list; and/or payment of outstanding bills for health care benefits for clients who have been taken off the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. If limited health care benefits coverage includes coverage of family support services, the coverage of family support services must be limited according to the

parameters set forth in subsection (b)(2)(C)(i) of this section. [~~These clients on the waiting list will be served in the same order used in paragraph (2)(A) of this subsection to take these clients off the waiting list.~~] This coverage may be provided [~~to these clients on the waiting list prior to or~~] at any point during activities described by subparagraphs (A) and (B) of this paragraph [~~paragraphs (2)(A) and (2)(B) of this subsection~~] and only as stipulated in paragraph (1)(C)(i) - (iii) of this subsection; [~~subsections (d)(1)(C)(i) - (iii) of this section;~~]

(D) remove any of the additional measures taken to generate cost savings [~~by the board~~] by rule according to subsection (c)(1)(C) of this section; and

(E) (No change.)

(e) The program shall establish a protocol to be used by the medical director or other designated medical staff to determine whether a client has an "urgent need for health care benefits" by considering criteria including, but not limited to, the following:

(1) - (3) (No change.)

(4) information received from CSHCN Services Program regional case management staff/contractors supports other information gathered and/or indicates that a delay in health care benefits could reasonably be expected to result in an out-of-home placement/institutionalization of the client because the family cannot continue to care for the client; and

(5) (No change.)

(f) The CSHCN Services Program [~~program~~] central office may establish and administer the waiting list for health care benefits to address a budget shortfall.

(1) In order to facilitate contacting clients on the waiting list, the CSHCN Services Program [~~program~~] shall collect information including, but not limited to the following:

(A) - (G) (No change.)

(2) (No change.)

(3) The program shall refer clients on the waiting list to other possible sources of services, and shall contact waiting list clients periodically to confirm their continuing need for CSHCN Services Program [~~program~~] services.

(4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 23, 2005.

TRD-200506108
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 458-7236

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CHAPTER 96. BLOODBORNE PATHOGEN CONTROL

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§96.101, 96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, 96.501, and the repeal of §96.601, concerning the applicability, minimum standards, safety recommendations, device registration procedures and fees, and sharps injury logs of bloodborne pathogen exposure control plans.

BACKGROUND AND PURPOSE

The amendments and repeal are necessary to comply with Health and Safety Code, §§81.301 - 81.307, which requires the department to establish an exposure control plan designed to minimize exposure of employees to bloodborne pathogens and to implement a registration program for needleless systems and sharps with engineered sharp injury protections; and House Bill 2292, 78th Legislature, Regular Session, 2003, §2.42, added Health and Safety Code, §12.0112, which requires that the term for licenses issued or renewed after January 1, 2005, will be two years.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 96.101, 96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, 96.501, and 96.601 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed and required by law; except that §96.601 will be repealed because the rule is no longer necessary.

SECTION-BY-SECTION SUMMARY

Amendments to §96.101 add more components to the definitions of "Governmental unit" and also provide additional information concerning the contracting of the Hepatitis B, C, and Human immunodeficiency viruses; §§96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, and 96.501 update and correct the department's reference from the "Texas Department of Health" to the "Department of State Health Services;" §§96.202, 96.303, and 96.401 provide a new website for information on bloodborne pathogen control; amendments to §96.301 and §96.501 reflect changes in the Department of State Health Services' organizational unit names and commissioner titles; amendments to §96.302 and §96.304 add a two-year period for registration and renewal fees; §96.501 is amended to change the date of expiration of a waiver from a stipulated date of December 31, 2001, to December 31 annually; to revise the authorization of the 1990 federal census and identify the 2000 federal census as the reference in determining county populations; and to change the request for a waiver date from January 1, 2001, to January 1 annually.

Section 96.601 is being repealed because the reference to the effective date of the rules is no longer relevant.

FISCAL NOTE

Jon Huss, Acting Section Director, Community Preparedness Section, has determined that for each year of the first five years that the sections are in effect, there will be fiscal implications to the state as a result of enforcing or administering the sections as proposed. The effect on state government will be an increase in revenue for the first year of $2,000 due to the two-year device registration fee. For years two through five, there will be no fiscal impact and no change in revenue. There will be no effect on local government.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Huss has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of administering the sections is reducing incidence to sharps injuries and the prevention of communicable disease in government employees and their contacts.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Kathryn Gardner, DrPH, RNC, Infectious Disease Surveillance and Epidemiology Branch, Infectious Disease Control Unit, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7676 or by e-mail to Kathryn.Gardner@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services' General Counsel, Cathy Campbell, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

25 TAC §§96.101, 96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, 96.501

The proposed amendments are authorized by Health and Safety Code, Subchapter H, Bloodborne Pathogen Exposure Control Plan, §§81.301 - 81.307. Specifically, §81.303 and §81.304 requires the department by rule to establish and implement an exposure control plan designed to minimize exposure of employees to bloodborne pathogens; §81.305, which requires the department to recommend that governmental units implement needleless systems and sharps with engineered sharps injury protection for employees; §81.306, which requires that the department by rule require that information concerning exposure incidents be recorded in a log; and §81.307, which requires that the department by rule implement a registration program for existing needleless systems and sharps with engineered sharp injury protections; Health and Safety Code, §12.0112, which requires that the term for licenses issued or renewed after January 1, 2005, will be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendments affect the Health and Safety Code, Chapters 12, 81, and 1001; and Government Code, Chapter 531. Review of the rules implements Government Code, §2001.039.

§96.101. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

(1) - (10) (No change.)

(11) Governmental unit--This state and any agency of the state, including a division, section, unit, branch, department, bureau, board, commission, or office and includes:

(A) - (B) (No change.)

(12) HBV--Hepatitis B virus. A virus that may be contracted through exposure to blood and/or body fluids and can result in chronic liver infections and cirrhosis.

(13) HCV--Hepatitis C virus. A virus that may be contracted through exposure to blood and/or body fluids and may result in chronic liver disease.

(14) (No change.)

(15) HIV--Human immunodeficiency virus. The HIV virus may be contracted through blood and/or body fluids and can result in Acquired Immune Deficiency Syndrome (AIDS), a condition in which the body is unable to fight infections.

(16) - (23) (No change.)

§96.201. Applicability.

(a) (No change.)

(b) These governmental units would include, but not limited to, hospital district hospitals, city hospitals, county hospitals, city/county hospitals, hospital authority hospitals, local health departments, Department of State Health Services regions and hospitals, other state hospitals and state schools [~~regional health departments, state hospitals, Mental Health Mental Retardation state hospitals and state schools~~], community mental health mental retardation centers, Texas Youth Commission, Texas Department of Criminal Justice, local- or state-funded university student infirmaries, public school district clinics, emergency medical services, local- or state-funded long term care facilities, and blood banks.

(c) (No change.)

§96.202. Exposure Control Plan.

(a) The exposure control plan (plan)[~~,~~] developed by the Department of State Health Services [~~Texas Department of Health~~] (department), is adopted as the minimum standard to implement Health and Safety Code, §81.304. The plan is designed to minimize exposure of employees as described in §96.201 of this title (relating to Applicability) and includes policies relating to occupational exposure to

bloodborne pathogens, training and educational requirements for employees, measures to increase vaccination of employees, and increased use of personnel protective equipment by employees.

(b) Copies of the plan are available on the Internet at http://www.dshs.state.tx.us/idcu/health/bloodborne_pathogens/reporting/ [~~http://www.tdh.state.tx.us/ideas/report/sharps.htm~~] or from the Department of State Health Services regional offices [~~Texas Department of Health Public Health Regional offices~~].

§96.203. Minimum Standards.

(a) This exposure control plan (plan) is provided by the Department of State Health Services [~~Texas Department of Health~~] (department) to be analogous with Title 29 Code of Federal Regulation §1910.1030, Occupational Safety and Health Administration (OSHA), Bloodborne Pathogens Standard as specified in Health and Safety Code, §81.304.

(b) - (c) (No change.)

§96.301. Safety Recommendations.

(a) The Department of State Health Services [~~Texas Department of Health~~] (department) recommends that governmental units implement needleless systems and sharps with engineered sharps injury protection for employees.

(b) Waiver for undue burden.

(1) (No change.)

(2) A report of the evaluation committee's decision to request a waiver shall be submitted in writing prior to January 1st of each year to the Assistant Commissioner, Prevention and Preparedness [~~Associate Commissioner, Disease Control and Prevention~~], 1100 West 49th Street, Suite G-401, Austin, Texas 78756.

(3) (No change.)

(4) The use of a prefilled syringe that is approved by the federal Food and Drug Administration may not be prohibited. [~~This prohibition expires on May 1, 2003.~~]

(c) Evaluation committee.

(1) (No change.)

(2) Whenever possible, the governmental entity establishing the evaluation committee shall consider using committees with similar duties already in existence [~~on September 1, 1999~~].

§96.302. Device Registration.

(a) The Department of State Health Services [~~Texas Department of Health~~] (department) shall compile and maintain a list of needleless system devices and sharps devices with engineered sharps injury protection that are available in the commercial marketplace and registered with the department to assist governmental units to comply with this chapter.

(b) - (i) (No change.)

(j) All device registration certificates shall expire two years from the date of issuance [~~on December 31, 2001 and annually thereafter~~].

(k) Renewal of registration.

(1) (No change.)

(2) The renewal registration certificate shall be valid for two years [~~through December 31st of the year issued~~].

(3) - (4) (No change.)

(l) (No change.)

§96.303. Registration Procedures.

(a) Any device manufacturer desiring to register a needleless system device or sharps device with engineered sharps injury protection shall make written application for registration on forms provided by the Department of State Health Services [~~Texas Department of Health~~] (department). A separate completed application is required for each device to be registered. Registration application forms may be obtained from the Department of State Health Services [~~Texas Department of Health, Bureau of Food and Drug Safety~~], 1100 West 49th Street, Austin, Texas, 78756.

(b) (No change.)

§96.304. Registration Fees.

The Department of State Health Services [~~Texas Department of Health~~] (department) shall charge a fee to register a needleless system device or sharps device with engineered sharps injury protection.

(1) An initial registration fee of $2,500 [~~$1,500~~] shall be required for each device registered for a two-year period.

(2) A renewal fee of $2,000 [~~An annual renewal fee of $1,000~~] shall be required for renewing the registration of each device for a two-year term.

(3) (No change.)

§96.401. Sharps Injury Log.

(a) - (d) (No change.)

(e) A chief administrative officer for each facility within a governmental unit or the designee shall report the contaminated sharps injury to the local health authority where the facility is located. The local health authority, acting as an agent for the Department of State Health Services [~~Texas Department of Health~~] (department), shall receive and review the report for completeness, and submit the report to the department. If no local health authority is appointed for the jurisdiction where the facility is located, the report shall be made to the regional director of the Department of State Health Services [~~Texas Department of Health~~] (department) regional office in which the facility is located.

(f) A contaminated sharps injury shall be reported on the department's Contaminated Sharps Injury Reporting Form or through an electronic means established by the department. Copies of the Contaminated Sharps Injury Reporting Form can be obtained on the Internet at http://www.dshs.state.tx.us/ideas/bloodborne_pathogens/reporting/ [~~http://www.tdh.state.tx.us/ideas/report/sharps.htm~~] or from the Department of State Health Services regional [~~Texas Department of Health Public Health Regional~~] offices.

§96.402. Confidentiality Statement.

(a) All information and materials obtained or compiled by the Department of State Health Services [~~Texas Department of Health~~] (department) or an agent of the department in connection with a report under this chapter are confidential and not subject to disclosure under Government Code, Chapter 552, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release by the department or its agents. For the purposes of these rules, all local health authorities are agents for the department.

(b) - (c) (No change.)

§96.501. Waiver for Rural Counties.

(a) The Department of State Health Services [~~Texas Department of Health~~] (department) shall waive the application of Health and Safety Code, Chapter 81, Subchapter H, to a rural county if the department finds that the application of the Subchapter to county would be burdensome.

(b) Waivers granted under this section expire annually by December 31 [~~December 31, 2001~~].

(c) A "Rural County" is a county that:

(1) (No change.)

(2) has a population of more than 50,000 but:

(A) (No change.)

(B) was not, based on the 2000 [~~1990~~] federal census, completely included within an area designated as urbanized by the Bureau of the Census of the United States Department of Commerce.

(d) A request for a waiver under the provisions of this section shall be submitted in writing prior to January 1 annually[~~, 2001~~] to the Assistant Commissioner, Prevention and Preparedness, [~~Associate Commissioner, Disease Control and Prevention,~~] 1100 West 49th Street, Suite G-401, Austin, Texas 78756.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 23, 2005.

TRD-200506109
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 458-7236

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25 TAC §96.601

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The proposed repeal is authorized by Health and Safety Code, Subchapter H, Bloodborne Pathogen Exposure Control Plan, §§81.301 - 81.307. Specifically, §81.303 and §81.304 requires the department by rule to establish and implement an exposure control plan designed to minimize exposure of employees to bloodborne pathogens; §81.305, which requires the department to recommend that governmental units implement needleless systems and sharps with engineered sharps injury protection for employees; §81.306, which requires that the department by rule require that information concerning exposure incidents be recorded in a log; and §81.307, which requires that the department by rule implement a registration program for existing needleless systems and sharps with engineered sharp injury protections; Health and Safety Code, §12.0112, which requires that the term for licenses issued or renewed after January 1, 2005, will be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The proposed repeal affects the Health and Safety Code, Chapters 12, 81, and 1001; and Government Code, Chapter 531. Review of the rules implements Government Code, §2001.039.

§96.601. Effective Dates.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 23, 2005.

TRD-200506110
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 458-7236

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 18. TOBACCO SETTLEMENT PERMANENT TRUST ACCOUNT

34 TAC §§18.1 - 18.4

The Comptroller of Public Accounts proposes amendments to §§18.1 - 18.4, concerning the administration and management of the assets of the Tobacco Settlement Permanent Trust Account (trust account) and the distribution formula. The purposes of the amendments are as follows:

First, the amendment to the definitions in §18.1 is intended to simplify the calculation of the distributions made from the trust account; provide for predictable, stable, and sustainable distributions over time; and protect and maintain the inflation adjusted value of the corpus.

Second, the amendment to §18.2 will change the distribution formula to simplify the calculation of the distributions and provide for predictable, stable, and sustainable distributions over time while maintaining the inflation adjusted value of the corpus.

Third, the amendment to §18.3 references the required contribution to the distribution stabilization account consistent with the revised distribution formula.

Fourth, the amendment to §18.4 will allow the comptroller or a designee, in addition to the investment advisory committee chair, to call meetings.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the amendments will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amended rule will be in providing new information regarding changes to the Tobacco Settlement Permanent Trust Account. The proposed amendments would have no anticipated significant economic cost to the public. The proposed amendments would have no fiscal impact on small businesses.

Comments on the proposal may be submitted to Paul Ballard, Chief Executive Officer, Texas Treasury Safekeeping Trust Com-

pany, 208 East 10th Street, Austin, Texas 78704. If a person wants to ensure that the comptroller considers and responds to a comment made about this proposal, then the person must ensure that the comptroller receives the comment not later than the 30th day after the issue date of the *Texas Register* in which this proposal appears.

The amendments are proposed under Government Code, §403.1041(h), which authorizes the comptroller to adopt rules related to the management and implementation of the trust account.

The amendments implement Government Code, §403.1041(h).

§18.1. Purpose and Definitions.

(a) (No change.)

(b) Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) adjusted current earnings [~~income~~]--current earnings [~~income~~] less investment expenses;

(3) average market value of the trust account [~~corpus~~]--calculated using the most recent twenty (20) calendar quarter end market values [~~the quarterly average market value of the corpus calculated over the life of the corpus not to exceed the most recent 12 calendar quarters~~];

[~~(4) average trust account balance--the annual average balance of the trust account calculated over the life of the trust account not to exceed the most recent three calendar years;~~]

[~~(5) calculated distribution amount--for any calendar year, the sum of:~~]

[~~(A) fifty percent (50%) of the adjusted current income for such year;~~]

[~~(B) twenty-five percent (25%) of the positive balance of the distribution stabilization account at the beginning of such year, and~~]

[~~(C) twenty-five percent (25%) of the cumulative net gains calculated as of the beginning of such year;~~]

(4) [~~(6)~~] corpus--the cumulative value of all [~~initial~~] contributions to the trust account, plus, all inflation adjustments; [~~:~~]

[~~(A) any future contributions and donations received by the comptroller for deposit in the trust account;~~]

[~~(B) all annual inflation adjustments; and~~]

[~~(C) all amounts transferred from the distribution stabilization account pursuant to §18.2 of this title (relating to Trust Account Distributions);~~]

[~~(7) cumulative net gains--all realized and unrealized gains on investments in the trust account calculated over the life of the trust account, less:~~]

[~~(A) all realized and unrealized losses on such investments during the same period;~~]

[~~(B) all inflation adjustments during the same period;~~]

[~~(C) all such gains included in the amounts actually distributed from the trust account to the political subdivisions during the same period, and~~]

[~~(D) all amounts of current net realized gains transferred to the distribution stabilization account during the same period pursuant to §18.2 of this title (relating to Trust Account Distributions);~~]

(5) [~~(8)~~] current earnings [~~income~~]--the sum of interest and dividend income, income from real estate and private equity investments, and total returns produced by investments designated by the governing investment policy as substitutes for fixed income earned by the trust account during the calendar year;

[~~(9) current net realized gains--for any calendar year, all realized gains on investments in the trust account for such year, less all realized losses on such investments for such year;~~]

(6) [~~(10)~~] distribution stabilization account--a separate account consisting of the amounts [~~of adjusted current income and current net realized gains~~] transferred pursuant to §18.2 of this title (relating to Trust Account Distributions). These amounts are accounted for separately from the corpus and will not be part of the corpus [~~unless otherwise directed by the investment advisory committee~~];

(7) [~~(11)~~] inflation adjustment--for any calendar year, the dollar amount achieved by multiplying the inflation adjustment factor [~~calculated as of the end of such year~~] by the [~~average market~~] value of the corpus [~~calculated~~] as of the beginning [~~end~~] of such year;

(8) [~~(12)~~] inflation adjustment factor--the average annual percentage change in the United States Consumer Price Index for All Urban Consumers (CPI-U) for the most recent 12 quarters as published by the United States Bureau of Labor Statistics;

(9) [~~(13)~~] investment advisory committee--the Tobacco Settlement Permanent Trust Account Investment Advisory Committee as defined by Government Code, §403.1041;

(10) [~~(14)~~] investment expenses--[~~the portion of the total earnings of the trust account that may be used to pay~~] investment related expenses, not to exceed amounts established by the Texas Legislature, [~~0.75% of the trust account balance~~] including, but not limited to, [~~transactions fees,~~] custodial fees, and fees for investment management, administration [~~outside money managers~~], investment consultants, or auditors;

(11) net earnings--the year-end market value of the trust account less the corpus value and the distribution stabilization account balance;

(12) [~~(15)~~] political subdivision--the meaning assigned by Government Code, §403.1041; and

[~~(16) total earnings--the sum of all changes in value from an investment including interest, dividends, and market value increases and decreases;~~]

(13) [~~(17)~~] trust account--the Tobacco Settlement Permanent Trust Account as defined by Government Code, §403.1041.[~~; and~~]

[~~(18) trust account balance--at any given time, the sum of the corpus and the total earnings calculated over the life of the trust account, less:~~]

[~~(A) all investment expenses during the same period;~~]

[~~(B) the amounts actually distributed from the trust account to the political subdivisions during the same period; and~~]

[~~(C) the balance of the distribution stabilization account.~~]

§18.2. Trust Account Distributions.

(a) (No change.)

(b) Subject to subsection (c) of this section, the actual distribution amount shall be 5% of the average market value of the trust account calculated as of the end of the calendar year immediately preceding the distribution. The actual distribution amount shall be distributed as follows: [In order to preserve the purchasing power of future trust account distributions and of the underlying corpus, the actual distribution amount for any calendar year shall in no event exceed the lesser of.]

(1) 4.5% to the political subdivisions; and [5.0% of the average trust account balance calculated as of the end of such year; or]

(2) 0.5% to the distribution stabilization account when the distribution stabilization account balance is less than the maximum balance, which shall be equal to three times the amount actually distributed in the preceding year from the trust account to the political subdivisions. When the distribution stabilization account balance equals the maximum balance, this 0.5% portion of the actual distribution amount shall not be distributed from the trust account. [the adjusted current income for such year plus the balance of the distribution stabilization account at the beginning of such year.]

(c) If the net earnings of the trust account are less than the calculated actual distribution amount in subsection (b) of this section, the actual distribution amount shall not exceed the amount in subsection (b)(1) of this section and shall be funded from the sources, until exhausted, in the order provided as follows [Unless otherwise established by the comptroller and approved by the investment advisory committee, the actual distribution amount for each calendar year and the maximum balance in the distribution stabilization account at the end of such year shall be determined as follows]:

(1) adjusted current earnings; [subject to subsection (b) of this section, the actual distribution amount shall be equal to the greater of:]

[(A) the calculated distribution amount or;]

[(B) the amount actually distributed from the trust account to the political subdivisions for the previous year multiplied by a factor equal to the sum of 1.0 and the inflation adjustment factor;]

(2) positive net earnings; then [subject to subsection (c)(3) of this section, the balance in the distribution stabilization account shall be increased by;]

[(A) an amount equal to fifty percent (50%) of the adjusted current income for such year less the difference between the actual distribution amount and the calculated distribution amount for such year; and]

[(B) twenty-five (25%) of the current net realized gains for such year,]

(3) distribution stabilization account [the maximum balance in the distribution stabilization account shall be equal to the amount actually distributed from the trust account to the political subdivisions for the previous year multiplied by three (3), and the amount that exceeds such maximum balance, if any, shall be added to the corpus].

§18.3. Annual Meeting of Investment Advisory Committee.

An annual meeting of the investment advisory committee shall be held on or before April 1st of each calendar year. The comptroller shall report to the investment advisory committee the performance of the trust account for the preceding calendar year. The investment advisory committee shall adopt the actual distribution amount to be used by the comptroller to make the distributions from the trust account to the political subdivisions and to the distribution stabilization account.

§18.4. Other Meetings of the Investment Advisory Committee.

Meetings of the investment advisory committee may be called by the chair of such committee, or by the comptroller or the comptroller's designee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505961
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: February 5, 2006
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.27

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §211.27, concerning Reporting Responsibilities of Individuals. A proposed amendment to subsection (d) amended by adding language that would require a licensee to report a permanent mailing address or address change to the Commission. New subsection (e) reflects the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by reducing the amount of time that Commission staff spends with outside entities to retrieve licensee addresses.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chap-

ter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.202 Complaints.

No other code, article, or statute is affected by this proposal.

§211.27. Reporting Responsibilities of Individuals.

(a) When a licensee is arrested, charged, or indicted for a criminal offense above the grade of Class C misdemeanor or for any Class C misdemeanor involving the duties and responsibilities of office or family violence, that person must report such fact to the commission in writing within 30 days, including the name of the arresting agency, the style, court, and cause number of the charge or indictment, if any, and the address to which notice of any commission action will be mailed.

(b) A person to whom this section applies must also report to the commission the final disposition of the criminal action within 30 days of the effective date of the disposition.

(c) A licensee must report any name change to the commission within 30 days.

(d) A licensee must report to the Commission a permanent mailing address other than an agency address and must report to the Commission any change within 30 days.

(e) [~~(d)~~] The effective date of this section is June 1, 2006 [~~March 1, 2002~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506061

Frank Woodall

Acting Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Proposed date of adoption: June 1, 2006

For further information, please call: (512) 936-7700

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37 TAC §211.29

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §211.29, concerning Responsibilities of Agency Chief Administrators. A proposed amendment to subsections (c), (f), (g), and (h) are amended to be consistent with the new language in the Texas Occupations Code §1701.452. Subsection (h) is amended to require that chief administrators notify the Commission of any changes to name, physical location, mailing address, electronic mail address, or telephone number. Subsection (i) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by ensuring that the rules are consistent with the requirements of the Occupations Code and ensuring that departmental information is current.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.452 Employment Termination Report, and §1701.153 Reports From Agencies and Schools.

No other code, article, or statute is affected by this proposal.

§211.29. Responsibilities of Agency Chief Administrators.

(a) An agency chief administrator is responsible for making any and all reports and submitting any and all documents required of that agency by the commission.

(b) An agency appointing a person who does not hold a commission license must file an application for the appropriate license with the commission.

(c) Before an [~~An~~] agency appoints [~~shall notify the commission of appointment of~~] any licensee to a position requiring a commission license it shall complete the reporting requirements of Texas Occupations Code §1701.451.

(d) An agency shall notify the commission, electronically or in writing, within 30 days, when it receives information that a person under appointment with that agency has been arrested, charged, indicted, or convicted for any offense above a Class C misdemeanor, or for any Class C misdemeanor involving the duties and responsibilities of office or family violence.

(e) Except in the case of a commission error, an agency that wishes to report a change to any information within commission files about a licensee shall do so in a request to the commission, containing:

(1) the licensee's name and social security number;

(2) the requested change; and

(3) the reason for the change.

(f) An agency must notify the commission, electronically or in writing, following the requirements of Texas Occupations Code §1701.452 within 30 days, when a person under appointment with that agency resigns or is terminated. [~~Such notification shall include the reason for resignation or termination.~~]

(g) An agency chief administrator must comply with orders from the commission regarding the correction of a report of resignation/termination or request a hearing from SOAH.

(h) [~~(g)~~] Line of duty deaths shall be reported to the commission in current peace officers' memorial reporting formats.

(i) [~~(h)~~] The effective date of this section is June 1, 2006 [~~March 1, 2001~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506062
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §211.31

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §211.31, concerning Memorandum of Understanding on Continuity of Care. An amendment is proposed for a name change for one of the agencies that work under this memorandum of understanding. Prior to January 2005, this agency was named The Texas Council on Offenders with Mental Impairments. During the 78th legislature, the mission of this agency was broadened, thus the name change to The Texas Correctional Office on Offenders with Mental and Medical Impairments. Subsection (b) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect, there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section, as proposed, will be in effect, there will be a positive benefit to the public by ensuring that the rules are consistent with the requirements of the Occupations Code and ensuring that departmental information is current.

The Commission has determined that for each year of the first five year the section as proposed will be in effect, there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.404 Memorandum of Understanding on Continuity of Care.

No other code, article, or statute is affected by this proposal.

§211.31. Memorandum of Understanding on Continuity of Care

(a) The Commission adopts, by reference, a memorandum of understanding that [~~which~~] establishes its responsibilities to institute a continuity of care program for offenders who are mentally impaired, elderly, physically disabled, terminally ill or significantly ill, as also adopted by the Texas Correctional Office on Offenders with Mental and Medical Impairments [~~Texas Council on Offenders with Mental Impairments~~] and the Texas Commission on Jail Standards. Copies of the memorandum of understanding may be obtained from the commission.

(b) The effective date of this section is June 1, 2006 [~~March 1, 2001~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506063
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.1, concerning Licensing of Training Providers. A proposed amendment to subsections (a)(3) and (b)(3) are amended to be consistent with definition changes and to licensing of training providers. Subsection (d) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section, as proposed, will be in effect there will be a positive benefit to the public by clarifying the intention of the rule.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with

Texas Occupations Code §1701.251 Training Programs; Instructors.

No other code, article, or statute is affected by this proposal.

§215.1. Licensing of Training Providers.

(a) The commission may issue credentials to three types of training or education providers:

(1) licensed law enforcement academy;

(2) contractual training provider; or

(3) a licensed academic alternative provider.

(b) The commission issues these licenses or contracts for a specified period of time:

(1) five years for a licensed law enforcement academy;

(2) two years for a contractual training provider;

(3) five years for a licensed academic alternative provider; or

(4) for a shorter period as appropriate for a program found to be at risk.

(c) License renewal is dependent upon continued compliance with commission rules and performance, which includes risk assessment.

(d) The effective date of this section is June 1, 2006 [~~June 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506064
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §215.5

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.5, concerning Contractual Training. A proposed amendment to subsection (f)(6) is changed to reflect proposed amendments to §211.1(a)(60), and §215.9. Subsection (f) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section, as proposed, will be in effect will be a positive benefit to law enforcement academies, contractual training, and academies alternative providers. Training providers are required by §215.9 to appoint a training coordinator. Section 215.9 sets out the qualifications of a training coordinator. This rule changes brings the language of §215.5(f)(6) in complement with §211.1(a)(60), and §215.9.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.251 Training Programs; Instructors.

No other code, article, or statute is affected by this proposal.

§215.5. Contractual Training.

(a) - (e) (No change.)

(f) If the commission determines that the needs assessment justifies a contract, the chief administrator of the contractual training provider must:

(1) - (5) (No change.)

(6) appoint and maintain the appointment of a [~~qualified~~] training coordinator;

(7) - (8) (No change.)

(g) By entering into any such contract the commission approves specific training which will be fully credited to each licensee [~~by the commission to each student licensee as continuing education training or to the agency as continuing education training provided by that agency~~], unless:

(1) - (3) (No change.)

(h) (No change.)

(i) The effective date of this section is June 1, 2006 [~~June 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506065
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §215.7

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.7, concerning Training Provider Advisory Boards. A proposed amendment to subsection (a) adds the Texas Occupations Code, §1701.252 for clarification. Subsection (b) is changed to provide reference to §1701.052 Texas Occupations Code establishing the criteria for public members of an advisory board. Subsection (f) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section, as proposed will be in effect there will be a positive benefit to law enforcement academies, contractual training, and academies alternative providers. Training providers are required by §1701.252 Texas Occupations Code to establish training advisory boards. These advisory boards must have one-third (1/3) of its members meet the requirements for a public member of the commission. Current rules do not reference the section that establishes these requirements.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.252 Program and School Requirements; Advisory Board.

No other code, article, or statute is affected by this proposal.

§215.7. Training Provider Advisory Board.

(a) All training providers approved by the commission must establish and maintain an advisory board, as required by the Texas Occupations Code, §1701.252 [~~law~~]. To be established, this board must have at least three members who are appointed by the sponsoring organization. To be maintained, the active, appointed membership of the board must not fall below a quorum for more than 30 days.

(b) The board may have members who are law enforcement personnel, however, one-third of the members must be public members having the same qualifications, found in the Texas Occupations Code, [~~Chapter~~] §1701.052 [~~1701.252~~], as any commissioner who is required by law to be a member of the general public. The chief administrator or head of the sponsoring organization and the designated training coordinator may only be ex-officio, non-voting members.

(c) - (k) (No change.)

(l) The effective date of this section is June 1, 2006 [~~June 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506066
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §215.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.11, concerning Training Provider Evaluations. A proposed amendment to subsections (c) and (d)(6) are for clarification on Training Provider Evaluations in order to better delineate the intent of the rule. Subsection (e) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by clarifying the intent of the rule.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.254 Training Provider Evaluations.

No other code, article, or statute is affected by this proposal.

§215.11. Training Provider Evaluations.

(a) All training providers shall be evaluated periodically and randomly. Providers with deficiencies will be evaluated more frequently, as determined by the commission.

(b) All training providers shall submit a self-assessment report each state fiscal year other types of evaluation methods, including, but not limited to, on-site evaluations may be used.

(c) An evaluation of the training provider will be based upon the current evaluation method(s) used. The results of the evaluation will be forwarded to the chief administrator, training coordinator, advisory board chair [~~members~~] and other appropriate persons associated with the training provider.

(d) The commission uses the following information in assessing the performance of training providers:

(1) licensing examination results;

(2) reports from past evaluation records;

(3) self-assessment reports;

(4) reports and evaluations from students, law enforcement agencies, and citizens;

(5) commission records;

(6) course [~~academy~~] records;

(7) observations by commission staff;

(8) information used as risk assessment factors; and

(9) any other relevant information about performance and practices.

(e) The effective date of this section is June 1, 2006 [~~March 1, 2001~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

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Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §215.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.15, concerning Enrollment Standards and Training Credit. A proposed amendment to this section is to clarify the intent of the rule by correcting grammar and delineating enrollment standards and training credit. Subsection (d) is amended to reflect the effective date for this change.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by clarifying the intent of the rule.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.255 Enrollment Qualifications.

No other code, article, or statute is affected by this proposal.

§215.15. Enrollment Standards and Training Credit.

(a) In order for an individual to enroll in any basic licensing course that [~~which~~] provides instruction in defensive tactics, arrest procedures, firearms, or use of a motor vehicle for law enforcement purposes, the academy must have on file:

(1) written documentation that the person is currently licensed by the commission; or

(2) if the individual [~~person~~] is not licensed by the commission, documentation that the individual has been subjected to a search of local, state and national records to disclose any criminal record;

(A) is not currently charged with any criminal offense for which conviction would be a bar to licensure;

(B) community supervision history:

(i) has never been on court-ordered community supervision or probation for any criminal offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order; but

(ii) the commission may approve the application of an individual who received probation or court-ordered community supervision for a Class B misdemeanor at least five (5) years prior to enrollment if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for licensure, and that the public interest would be served by reducing the waiting period;

(C) conviction history:

(i) has never been convicted of an offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years; but

(ii) the commission may approve the application of an individual who was convicted of a Class B misdemeanor at least five (5) years prior to enrollment if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for licensure, and that the public interest would be served by reducing the waiting period.

(D) For purposes of this section, the commission will construe any court ordered community supervision, probation, or conviction for a criminal offense to be its closest equivalent under the Texas Penal Code classification of offenses if the offense arose from:

(i) another penal provision of Texas law; or

(ii) a penal provision of any other state, federal, military or foreign jurisdiction.

(E) A classification of an offense as a felony at the time of conviction will never be changed because Texas law has changed or because the offense would not be a felony under current Texas law.

(F) has never been convicted of any family violence offense;

(G) is not prohibited by state or federal law from operating a motor vehicle;

(H) is not prohibited by state or federal law from possessing firearms or ammunition; and

(I) is a U.S. citizen.

(b) In order for an individual to enroll in any basic peace officer training program that [~~which~~] provides instruction in defensive tactics, arrest procedures, firearms, or use of a motor vehicle for law enforcement purposes, the academy must have on file:

(1) a high school diploma;

(2) a high school equivalency certificate and evidence of successful completion of [~~has completed~~] at least 12 hours from [~~at~~] an institution of higher education with at least a 2.0 grade point average on a 4.0 scale; or

(3) an honorable discharge from the armed forces of the United States after at least 24 months of active duty service;

(c) The enrollment standards established in this section do not preclude the academy licensee from establishing additional requirements or standards for enrollment in law enforcement training programs.

(d) The effective date of this section is June 1, 2006 [~~June 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506068

Frank Woodall

Acting Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Proposed date of adoption: June 1, 2006

For further information, please call: (512) 936-7700

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37 TAC §215.17

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §215.17, concerning Distance Education. A proposed amendment to subsection (e) is making grammatical changes that will provide clarification with regard to distance education. Subsection (f) is amended to reflect the effective date for this change.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by clarifying the intent of the rule.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.251 Training Programs; Instructors.

No other code, article, or statute is affected by this proposal.

§215.17. Distance Education.

(a) A distance education course may be conducted either by the commission or with the advanced approval of the commission.

(b) Training providers desiring commission approval for a distance education course must submit their request in accordance with the commission's Distance Education Guidelines. The commission may charge a cost recovery fee for reviewing these submissions.

(c) Each course will have one or more sponsors assigned, who shall be responsible both for the conduct of the course, and for proctoring any examination during the course.

(d) To receive credit for a distance education course, the student must, without the use of deceitful means, complete each required unit, and receives a passing grade on any examination, course work, or evaluation required by the lesson guide or learning objectives.

(e) The training provider should ensure that the student's assigned work is corrected, graded, and reviewed by qualified instructors. Corrected assignments are returned to the student via [~~,~~] an exchange that [~~which~~] provides a personalized student-teacher relationship.

(f) The effective date of this section is June 1, 2006 [~~March 1, 2002~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506069

Frank Woodall

Acting Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Proposed date of adoption: June 1, 2006

For further information, please call: (512) 936-7700

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CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.7

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.7, concerning Reporting the Appointment and Termination of a Licensee. A proposed amendment to subsections (a), (b), and (g) are a result of amendments to the Texas Occupations Code §1701.451. Pre-employment Request for Employment Termination Report and Submission of Background Check Conformation Form, §1701.452. Employment Termination Report, and §1701.4525 Request for Correction of Report; Administrative Penalty; Hearing; Appeal. These changes require chief administrators to request records from the Commission as part of the background check confirmation, to include F-5 documentation. These changes also require chief administrators of a law enforcement agency to document an explanation of circumstances on the F-5 form. This new legislation action allows an appeal process to a licensee who may contest the reasons for termination and/or resignation stated on the F-5. Subsection (i) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be significant fiscal implications to state or local governments as a result of administering the section. Although the Texas Occupations Code, §1701.4525(b) states that the Commission may assess administrative penalty, the Commission does not have statutory authority to assess penalties.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed would be in effect there will a positive benefit to the public by requiring chief administrators to conduct thorough background checks on applicants and to report accurately on the F-5 Employment Termination Report.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.451 Pre-employment Request for Employment Termination Report, and Submission of Background Check Confirmation Form.

No other code, article, or statute is affected by this proposal.

§217.7. Reporting the Appointment and Termination of a Licensee.

(a) Before hiring or appointing a licensee, an agency shall contact the commission, electronically or in writing, to comply with the reporting requirements of Texas Occupations Code §1701.451. [~~to determine whether the commission has employment history records on that individual. If employment history records exist, then the agency shall contact the previous employing agency(ies) in writing to request employment information.~~]

(b) A commission member or other individual may not release the contents of a report or statement submitted unless the request meets the requirements of Subchapter J, Texas Occupations Code, Chapter 1701. The commission is not liable for civil damages for providing information contained in a report or statement maintained by the commission under Subchapter J if the commission released the information as prescribed by Subchapter J. [~~In order to receive information and/or a copy of the termination form from employment history records regarding the reasons for resignation or termination, the inquiring agency must request the information in writing on the agency's letterhead. The request must be signed by the agency chief administrator or designee. The request must be accompanied by a commission form that authorizes release of that information. This form must be signed and sworn to by the individual who is the subject of the report.~~]

(c) An agency that appoints an individual who already holds a valid, active license appropriate to that position must notify the commission of such appointment not later than 30 days after the date of appointment. The appointing agency must have on file documentation that the licensee is compliant with weapons qualification according to §217.21 within the last 12 months. This notification must be made in the currently prescribed commission format that reports appointment. This format must be completed, and filed with the commission by the agency's chief administrator.

(d) Before appointing a licensee whose license has expired, an agency shall ensure that the individual meets the current minimum standards for licensure.

(e) If the appointment is made after a 180-day break in service, the agency must have the following on file and readily accessible to the commission:

(1) a new criminal history check by name, sex, race and date of birth from both TCIC and NCIC;

(2) a new declaration of psychological and emotional health;

(3) a new declaration of lack of any drug dependency or illegal drug use; and

(4) one completed applicant fingerprint card or, pending receipt of such card, an original sworn, notarized affidavit by the applicant of his or her complete criminal history; such affidavit to be maintained by the agency while awaiting the return of completed applicant fingerprint card; and

(5) for peace officers, weapons qualification according to §217.21 within the last 12 months.

(f) An agency must retain records kept under this section for a minimum of five years after the licensee's termination date with that agency. The records must be maintained in a format readily accessible to the commission.

(g) When an individual licensed by the commission resigns from appointment or employment with an agency or if an individual's appointment or employment is terminated for any reason, the agency shall submit a report to the commission in the currently prescribed commission format that reports resignation or termination, including all emergency telecommunicators. The report shall be submitted within 30 days following the date of resignation or termination. The report shall include an explanation of the circumstances under which the individual resigned, [~~or~~] was terminated, or other and one of the following designations: retired, honorably discharged, dishonorably discharged, generally discharged, killed in the line of duty, died, or disabled. The agency shall provide the individual who is the subject of the report a copy of the report. The individual may submit a petition [~~written~~

~~statement~~] to the commission to contest the information included [~~or explain any matters contained~~] in the report not later than the 30th day after they receive a copy of the report. They must also submit a copy of the petition to the law enforcement agency.

(h) A report or statement submitted under this section is exempt from disclosure under the Public Information Act, Chapter 552, Government Code, unless the individual resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, and is subject to subpoena only in a judicial proceeding.

(i) The effective date of this section is June 1, 2006 [~~June 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506077
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §217.8

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes new §217.8, concerning Contesting an Employment Termination Report. Adding new §217.8 is in accordance with Texas Occupations Code §1701.452. This amended chapter adds new requirements, responsibilities, and liability for chief administrators to properly document the reason for the departure of a licensee on the F-5 form. This section allows for an appeal process for licensees who disagree with the reasons documented on their respective F-5.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section because the actions described are consistent with procedures currently in place at the Commission.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed would be in effect there will be a positive benefit to the public by holding law enforcement agencies responsible to by providing good information to prospective hiring law enforcement agency administrators of a licensee.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The new rule is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The new rule as proposed is in compliance with Texas Occupations Code §1701.4525 Request for Correction of Report; Administrative Penalty; Hearing; Appeal.

No other code, article, or statute is affected by this proposal.

§217.8. Contesting an Employment Termination Report.

(a) A person who is the subject of an employment termination report described in §217.7(g) of this subchapter is entitled to file a petition contesting information included in the employment termination report. The petition for correction of the report must be filed with the executive director and a copy must be served on the law enforcement agency.

(b) A petition described in subsection (a) of this section must be received by the executive director not later than the 30th day after the person receives a copy of the report, and must be accompanied by any evidence offered by the person in support of the requested correction.

(c) The law enforcement agency may submit rebutting evidence not later than the 20th day after the agency receives a copy of the petition.

(d) Upon review of the petition and any rebutting evidence offered by the law enforcement agency, the executive director may either:

(1) recommend that the commission order the chief administrative officer of the law enforcement agency to correct the report; or

(2) refer the dispute to the State Office of Administrative Hearings.

(e) A proceeding conducted pursuant to subsection (d)(2) of this section is a contested case under Chapter 2001, Government Code. The parties to the proceeding shall be the person contesting the employment termination report, the chief administrative officer of the law enforcement agency, and the executive director. The person contesting the employment termination report shall have the burden of proof by a preponderance of the evidence. Following the contested case hearing, the administrative law judge shall issue a proposal for decision to the commission.

(f) Any party to a proceeding described in subsection (e) of this section may file exceptions to the administrative law judge's proposal for decision in accordance with §223.11(b) of this title.

(g) A final order issued by the commission under subsection (d)(1) of this section, or after a hearing described in subsection (e) of this section is enforceable by the commission pursuant to Chapter 1701, Texas Occupations Code and Chapter 2001, Government Code.

(h) A final order issued by the commission under subsection (d)(1) of this section, or after a hearing described in subsection (e) of this section is appealable in accordance with Chapter 2001, Government Code.

(i) A chief administrative officer of a law enforcement agency who fails to comply with a final order issued by the commission under subsection (d)(1) of this section, or after a hearing described in subsection (e) of this section is subject to disciplinary action pursuant to Chapter 1701, Texas Occupations Code, and Chapter 223 of this title.

(j) The effective date of this section is June 1, 2006.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200506075
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §217.9

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.9, concerning Continuing Education Credit for Licensees. A proposed amendment to subsection (b) is amended to include new paragraph (7) the Peace Officers System for Education and Internet Training (POSEIT) to the list of items for which credit may be refused if the course has been completed within the current training unit. Additionally, subsection (b) is amended by adding new paragraph (8) that includes any distance education course to the list of items that may be refused credit if the item has been completed within the current training unit. Subsection (d) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed would be in effect there will be a positive benefit to the public by ensuring that officers take varied training.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.351 Continuing Education Required for Peace Officers.

No other code, article, or statute is affected by this proposal.

§217.9. Continuing Education Credit for Licensees.

(a) A continuing education course is any training course that is recognized by the commission, specifically:

(1) legislatively required continuing education curricula and learning objectives developed by the commission:

(2) training in excess of basic licensing course requirements;

(3) training courses consistent with assigned duties; or

(4) training not included in a basic licensing course.

(b) The commission may refuse credit for:

(1) a course, which does not contain a final examination or other skills test, if appropriate, as determined by the training provider;

(2) annual firearms proficiency;

(3) an out of state course not approved by that state's POST;

(4) training that fails to meet any commission established length and published learning objectives;

(5) an instructor claiming credit for a basic licensing course or more than one presentation of a non-licensing course by an instructor, per 24 month unit of a training cycle; or

(6) course(s) claimed by deceitful means;

(7) courses taken two or more times on the Peace Officer System for Education and Internet Training (POSEIT) system within one training unit.

(8) courses provided by the same training provider and taken two or more times within one training unit.

(c) The training provider or agency must report to the commission and keep on file in a format readily accessible to the commission, a copy of all continuing education course training reports.

(d) The effective date of this section is June 1, 2006 [~~June 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506078
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §217.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.11, concerning Legislatively Required Continuing Education for Licensees. A proposed amendment to subsection (e)(2) adds new language and amends current language to reflect changes in Texas Occupations Code §1701.354(d). Subsection (f) is amended by changing the notification method to match the law. Subsections (g) and (h) are amended and will add new language due to amended legislation of the Texas Occupations Code, §1701.353(b), which requires the Commission to seek disciplinary action rather than expiration of license. Subsections (j) and (k) are deleted because they have expired. Subsection

(l) is added here and was removed from §217.17. Subsection (m) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be some fiscal implications as a result of administering the section. The Commission will be charged with conducting additional administrative hearings as a result of this amendment.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed would be in effect there will be a positive benefit to the public by changing the wording to read as it is stated in the law.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 U.S. 290 East, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §§1701.251 Training Programs; Instructors, 1701.352 Continuing Education Programs, 1701.353(B) Continuing Education Procedures, and 1701.354 Continuing Education for Constables and Deputy Constables.

No other code, article, or statute is affected by this proposal.

§217.11. Legislatively Required Continuing Education for Licensees.

(a) Each agency that appoints or employs peace officers, reserve law enforcement officers, jailers, or public security officers shall provide each peace officer, reserve law enforcement officer, jailer, or public security officer it appoints or employs a continuing education program at least once every 24 month unit of a training cycle.

(b) The legislatively required continuing education program for individuals licensed as peace officers shall consist of 40 hours of training every 24 month unit of a training cycle. This rule does not limit the number of hours of continuing education an agency may provide to each peace officer, reserve law enforcement officer, jailer, or public security officer it appoints or employs.

(c) Part of the legislatively required peace officer training must include the curricula and learning objectives developed by the commission, to include:

(1) civil rights, racial sensitivity, and cultural diversity during each current training cycle;

(2) the recognition and documentation of cases that involve child abuse or neglect, family violence, sexual assault, issues concerning sex offender characteristics during each current training cycle. If an agency chief administrator determines these subjects to be inconsistent with the peace officer's assigned duties, the chief administrator may substitute other training determined to be consistent with the officer's assigned duties and report the substitution to the commission; and

(3) supervision issues for each peace officer appointed to their first supervisory position, this training must be completed within 24 months following the date of appointment as a supervisor.

(d) Individuals licensed as reserve law enforcement officers, jailers, or public security officers shall meet the requirements in subsection (c)(1) of this section.

(e) Each constable and deputy constable shall also complete a 20 hour course of training in civil process during each current training cycle. The commission may waive the requirement for civil process training if: [~~the constable submits a written request for a waiver, because of hardship and~~] the commission determines that a hardship exists.

(1) for a deputy constable, if a constable requests a waiver for the deputy constable based on a representation that the deputy constable's duty assignment does not involve civil process responsibilities; or

(2) the deputy constable submits a written request for a waiver because of hardship and the commission determines that a hardship exists.

(f) The commission shall provide adequate notice to agencies and licensees of impending non-compliance with the legislatively required continuing education. [~~Such notice will be provided not later than six months prior to the expiration of the current training cycle.~~]

(g) The chief administrator of an agency that has licensees who are in non-compliance shall, within 30 days of receipt of notice of non-compliance, submit a report to the commission explaining the reasons for such non-compliance.

(h) [~~(g)~~] The commission may suspend or deny renewal of a license for failure to complete the legislatively required continuing education program at least once every training unit [~~cycle~~].

(i) [~~(h)~~] The commission may take action against a licensee for failure to complete the required training in either or both of the 24 month units within a training cycle.

(j) [~~(i)~~] Individuals licensed as peace officers shall complete the legislatively required continuing education program required under this section beginning in the first complete 24 month unit immediately following the date of licensing.

[~~(j) Individuals licensed as peace officers shall attend a course, developed by the commission, on asset forfeiture no later than September 1, 2002.~~]

[~~(k) Individuals licensed as peace officers shall attend a course, developed by the commission, on racial profiling no later than September 1, 2003.~~]

(k) [~~(l)~~] All peace officers must meet all continuing education requirements except where exempt by law.

(l) Licensees who have met the current legislatively required continuing education will have their license(s) automatically renewed on the last day of the training unit.

(m) The effective date of this section is June 1, 2006 [~~March 1, 2002~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506079
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §217.17

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Law Enforcement Officer Standards and Education or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes the repeal of §217.17, concerning License Renewal. This section is deleted due to change in law. During the 79th Legislature, Regular Session, House Bill 1438 amended Section 1701.353(b) and charges the Commission to request a report from an employing agency of a licensee who is non-compliant with continuing education requirements. This amendment also requires the Commission to contact licensee by certified mail if records indicate that they are in noncompliance. This change grants a licensee a 60-day extension to obtain the required training or request an administrative hearing if the licensee claims that mitigating circumstances exist or if the licensee's employing agency did not provide the opportunity to attend required training course. This change eliminates this section and expiration of license.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be some fiscal implications as a result of administering the section. The Commission will be charged with conducting additional administrative hearings as a result of the proposed section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed would be in effect there will be a positive benefit to the public by changing the wording to read as it is stated in the law.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The repeal is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The repeal as proposed is in compliance with Texas Occupations Code §1701.353 Continuing Education Procedures.

No other code, article, or statute is affected by this proposal.

§217.17. Active License Renewal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506076
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §217.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.19, concerning Reactivation of a License. A proposed amendment to subsection (a) is to clean up language used to reactivate a license. Subsections (b) and (c) are deleted because they do not belong in this section as these individuals have never held a license. Subsections (d) - (h) are changed to keep alphabetical order. Subsection (f) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be no fiscal implications as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed would be in effect there will be a positive benefit to the public by changing the wording to clarify the rule.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.316 Reactivation of Peace Officer License.

No other code, article, or statute is affected by this proposal.

§217.19. Reactivation of a License.

(a) The commission will place all licenses in an inactive status when the licensee has not [~~neither~~] been reported to the commission as appointed for more than two yearsunless the licensee has met and continues to meet the continuing education required by §217.11 of this chapter. [~~after:~~]

[~~(1) the last report of termination, or~~]

[(2) the date of last reactivation, nor]

[(3) met all the continuing education requirements.]

[(b) Individuals with basic licensure training over two years old must meet the requirements of (g) before they may be appointed.]

[(c) Individuals with basic licensure examination results over two years old must meet the requirements of (g) before they may be appointed.]

(b) [(d)] The holder of an inactive license is unlicensed for purposes of these sections and the Texas Occupations Code, Chapter 1701.

(c) [(e)] This section includes any permanent peace officer qualification certificate with an effective date before September 1, 1981.

(d) [(f)] This section includes any jailer licenses issued after March 1, 2001.

(e) [(g)] Before individuals [with inactive licenses] may be appointed they must:

(1) meet the current licensing standards, with successful completion of a basic licensing course current at the time of initial licensure; fulfilling this requirement;

(2) successfully complete the legislatively required continuing education for the current training unit [cycle];

(3) make application and submit any required fee(s) for an endorsement in the format currently prescribed by the commission;

(4) obtain an endorsement, issued by the commission, giving the individual eligibility to take the required licensing examination; and

(5) meet the requirements of §217.3 of this chapter; and

(6) pass the licensing examination for the license to be reactivated. After three failures, or if the endorsement expires, the individual must re-qualify by repeating the entire training course for the license sought.

(f)[(h)] The effective date of this section is June 1, 2006 [June 1, 2004].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506080
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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CHAPTER 219. PRELICENSING AND REACTIVATION COURSES, TESTS, AND ENDORSEMENTS

37 TAC §219.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §219.1, concerning Eligibility to Take State Examinations. Proposed amendments to subsection (b)(2) is to clarify out of state officers that must meet our definition of peace officer. Subsection (b)(3) was added to include exam results that are over two years old and never appointed. Amendments to subsections (i) and (j) are for clarification. Subsection (k) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will a positive benefit to the public by better identifying which individuals may apply to test.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.304 Examination.

No other code, article, or statute is affected by this proposal.

§219.1. Eligibility to Take State Examinations.

(a) To be eligible to take a state licensing examination, a student must have a valid endorsement.

(b) A valid endorsement is based on:

(1) a previously completed basic licensing course, [; or]

(2) out of state training, licensing, or certification as a peace officer; or [.]

(3) an expired examination result; over two years old.

(c) A valid endorsement shall:

(1) be in the approved commission format;

(2) be a completed original document bearing all required signatures,

(3) state that the examinee has met the current minimum training standards appropriate to the license sought; and

(4) include a date of issue and an expiration date.

(d) For an endorsement to be or remain valid:

(1) it must not be issued in error or based on false or incorrect information; specifically, the applicant must meet the current enrollment standards; or if previously licensed, have met the enrollment standards at initial licensure; and

(2) it must be presented before its expiration date.

(e) An endorsement to take an examination is issued by a training coordinator, the registrar of a licensed academic alternative provider, the executive director of the commission, or a person authorized by the executive director. Duplicate endorsements may only be issued by the executive director of the commission.

(f) In order to issue the endorsement [~~of eligibility~~], the person issuing such an endorsement, other than a commission employee, must have on file for the person to whom it is issued, written documentation of successful completion of the basic licensing course for the license sought; and

(1) written documentation that the person to whom it is issued was previously licensed by the commission, or

(2) if the person is not currently licensed by the commission, written documentation that the applicant meets the current enrollment standards.

(g) In order to receive an endorsement from the commission, individuals must meet all current requirements, to include submitting any required application currently prescribed by the commission, requested documentation, and any required fee.

(h) An examination may not be taken by an individual who already holds an active license or certificate to be awarded upon passing that examination.

(i) Once an initial endorsement is issued, an examinee will be allowed three opportunities to pass the examination while the examinee's endorsement remains valid. After three failures or expiration of the endorsement, the examinee must re-qualify by repeating the entire training course for the license sought. If an attempt is invalidated for any reason, except for a commission error, that attempt will count as one of the three opportunities.

(j) Once an initial endorsement from an academic alternative provider expires after three failures or expiration of the endorsement [~~from either date or failure,~~] individuals will be required to re-qualify by completing the standard coursework for the license sought.

(k) The effective date of this section is June 1, 2006 [~~June 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506070
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §219.5

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §219.5, concerning Examinee Requirements. A proposed amendment to subsection (a)(2) requires a federal or state issued photo ID to take a licensing exam. Subsection (c) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by insuring the person taking the test has a valid ID.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.304 Examination.

No other code, article, or statute is affected by this proposal.

§219.5. Examinee Requirements.

(a) To be eligible to sit for an examination, an examinee must:

(1) possess and display at the examination site a valid endorsement for the specific type of examination sought;

(2) Bring to the examination site and display upon request [~~some~~] identification issued by the state or federal government with the examinee's [~~card which contains a~~] photograph;

(3) Report on time;

(4) Not disrupt the examination;

(5) Comply with all the written and verbal instructions of the proctor; and

(6) Shall not:

(A) bring into the examination room any books, notes, or other written material related to the content of the examination;

(B) refer to, use, or possess any such written material in the examination room;

(C) bring into the examination room any cellular phones, pagers, or other such electronic devices;

(D) give or receive answers or communicate in any manner with another examinee during the examination;

(E) communicate any of the content of an examination to another at any time;

(F) steal, copy, or in any way reproduce any part of the examination;

(G) engage in any deceptive or fraudulent act to gain admission;

(H) engage in any deceptive or fraudulent act during or after an examination; or

(I) solicit, encourage, direct, assist or aid another person to violate any provision of this section or to compromise the integrity of the examination.

(b) The commission may deny or revoke any license or certificate held by a person who violates any of the provision of this section. The commission shall file a criminal complaint against any individual who steals or attempts to steal any portion of the examination, or who engages in any fraudulent act relating to the examination process.

(c) The effective date of this section is June 1, 2006 [~~June 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506071
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES

37 TAC §221.9

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.9, concerning Standardized Field Sobriety Testing Proficiency (SFST). A proposed amendment to subsection (a) is amended by changing the proficiency certificate to a practitioner certificate and removes the 35-test case requirement, which is not part of the National Highway Transportation Safety Administration (NHTSA) curriculum. These changes meet or exceed the minimum standards established by the Commission. Subsection (b) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by allowing individuals that complete that NHTSA SFST practitioner curriculum training that meets or exceeds the minimum standards established by the Commission, to receive this proficiency certificate. This would also allow the Commission to comply with verbiage set out in Emerson v. State.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.402 Proficiency Certificates.

No other code, article, or statute is affected by this proposal.

§221.9. Standardized Field Sobriety Testing Practitioner [~~Proficiency~~] (SFST).

(a) To qualify for a standardized field sobriety testing practitioner [~~proficiency~~] certificate, an applicant must meet all proficiency requirements including successful completion of the current National Highway Traffic Safety Administration (NHTSA) approved SFST Practitioner Course [~~and 35 field test evaluations~~] as reported by an [~~the~~] approved training provider.

(b) The effective date of this section is June 1, 2006 [~~March 1, 2001~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506072
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §221.13

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.13, concerning Emergency Telecommunications Proficiency. A proposed amendment to subsection (a) is amended to require TCIC/NCIC for Full Access Operators and TLETS/NLETS within the first year of experience. Subsection (b)(3) is amended to require 160 hours of continuing education training. Subsection (b)(4)(D) is amended by removing TCIC/NCIC for Full Access Operators and TLETS/NLETS as intermediate proficiency requirements. Subsection (d) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there

will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by ensuring that all emergency telecommunication operators are in compliance with mandated requirements for full access to TCIC/NCIC and TLETS/NLETS as set out in federal regulations allowing individuals who meet or exceed the minimum standards established by the Commission to receive this proficiency certificate. The movement of the TCIC/NCIC for Full Access Operators and TLETS/NLETS training to the basic level increases the training received by 40 hours. Telecommunicators completing the required basic courses will have received 160 hours of training. This necessitates an increase in the hours required for intermediate certification to at least equal the hours obtained earning the basic certificate. Since changes to this rule are the result of current required training, there is no increase in costs to affected agencies.

The Commission has determined that for each year of the first five year the section as proposed will be in effect, there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.404 Telecommunicators.

No other code, article, or statute is affected by this proposal.

§221.13. Emergency Telecommunications Proficiency.

(a) To qualify for a basic telecommunications proficiency certificate, an applicant must meet all proficiency requirements including:

(1) successful completion of a 40-hour course developed or approved by the commission;

(2) successful completion of TLETS/NLETS and TCIC/NCIC Basic Procedures, or TCIC/NCIC for Full Access Operators and TLETS/NLETS Basic Operator's Course as established by federal regulations;

(3) [~~(2)~~] successful completion of a departmental field training course; and

(4) [~~(3)~~] one year of experience in public safety telecommunications

(b) To qualify for an intermediate telecommunications proficiency certificate, an applicant must meet all proficiency requirements including:

(1) basic telecommunications certification;

(2) at least two years' experience in public safety telecommunications;

(3) 160 [~~120~~] hours of training; and

(4) if the basic telecommunications certificate was issued or qualified for on or after January 1, 2000, successful completion of required courses as specified by the commission, which include:

(A) Cultural Diversity, [;]

(B) Ethics for Law Enforcement, [;]

(C) Crisis Communications; and [;]

[~~(D) TCIC/NCIC for Full Access Operators; NLETS/TLETS; or Criminal Law; and~~]

(D) [~~(E)~~] Spanish for Law Enforcement.

(c) To qualify for an advanced telecommunications proficiency certificate, an applicant must meet all proficiency requirements including:

(1) intermediate telecommunications certificate;

(2) at least four years experience in public safety telecommunications; and

(3) 240 training hours.

(d) The effective date of this section is June 1, 2006 [~~March 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506073
Frank Woodall
Acting Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Proposed date of adoption: June 1, 2006
For further information, please call: (512) 936-7700

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37 TAC §221.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.19, concerning Firearms Instructor Proficiency. Subsection (b) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the section.

The Commission has determined that for the each year of the first five years the section as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect there will be a positive benefit to the public by allowing individuals with comparable training that meets or exceeds the minimum standards established by the Commission to receive this proficiency certificate.

The Commission has determined that for each year of the first five year the section as proposed will be in effect there will be no anticipated economic cost to individuals as a result of the proposed section.

Comments may be submitted in writing to Mr. Frank Woodall, Acting Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter. The rule amendment as proposed is in compliance with Texas Occupations Code §1701.402 Proficiency Certificates.

No other code, article, or statute is affected by this proposal.

§221.19. Firearms Instructor Proficiency.

(a) To qualify for a firearms instructor proficiency certificate, an applicant must meet all proficiency requirements including:

(1) at least three years' experience as a licensee or a firearms instructor;

(2) holds a current instructor license or certificate issued by the commission; and

(3) successful completion of the commission's firearms instructor course, or a firearms instructor course that meets or exceeds the minimum standards established and approved by the commission.

(b) The effective date of this section is June 1, 2006 [~~January 1, 2005~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506074

Frank Woodall

Acting Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Proposed date of adoption: June 1, 2006

For further information, please call: (512) 936-7700

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 122. FACILITIES PLANNING SUBCHAPTER A. APPLICATION FOR STATE-LEASED OR OWNED FACILITIES

1 TAC §122.1, §122.2

The Texas Building and Procurement Commission (TBPC) adopts the repeal of 1 TAC Chapter 122, Subchapter A, §122.1 and §122.2. The repeal is adopted without changes to the proposal as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7323).

This repeal is adopted because a new Title 1, Chapter 122 was simultaneously proposed in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7324) and is being adopted elsewhere in this issue. The new Chapter 122 revises the TBPC's space allocation program rules to conform to 2005 legislative changes, reorganizes the sections for enhanced clarity and ease of use, and emphasizes allocation of space in a manner consistent with private sector standards and industry best practices.

These rules are being repealed to allow new rules to go into effect.

No comments were received regarding the repeals.

The repeals are adopted under Texas Government Code §2165.104(c) authorizing the TBPC to adopt rules relating to the space allocation program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 23, 2005.

TRD-200506105
Ingrid Hansen
General Counsel
Texas Building and Procurement Commission
Effective date: January 12, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 463-7829

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CHAPTER 122. FACILITIES SPACE PLANNING

1 TAC §§122.1 - 122.3

The Texas Building and Procurement Commission (TBPC) adopts new Chapter 122, §§122.1 - 122.3, relating to space allocation with changes to the proposed text as published in the November 11, 2005, of the *Texas Register* (30 TexReg 7324).

The new chapter revises the TBPC's facilities planning program rules to conform to 2005 legislative changes, reorganizes the sections for enhanced clarity and ease of use, and emphasizes allocation of space in a manner consistent with private sector standards and industry best practices.

SUMMARY OF AND RESPONSE TO COMMENTS. The TBPC received comments from the Office of the Attorney General of Texas, the Texas Commission on Environmental Quality, and the Texas Parks and Wildlife Department. Changes to the proposed rules were made based on the comments. The TBPC appreciates the thoughtful and helpful comments received from these entities.

As amended by the 79th Texas Legislature, Texas Government Code, §2165.104(c), relating to space allocation, requires TBPC to allocate space to governmental entities in a manner consistent with private sector standards and industry best practices. Nothing in these rules shall be construed to alter, amend, or modify the legal requirements in any statute or other regulations related to space allocation.

§122.1.

One commenter asserted that the definitions of various levels of agency staff contained in §122.1 may not be consistent with the organizational structure of each agency and therefore do not address the amount of space allocated in such instances. In addition, this commenter recognized that the allocation of space to areas such as conference rooms, laboratories, and storage is also not specifically addressed. No change to the proposed rules is necessary, because the space allocation process, as established by new Chapter 122, allows TBPC to assess individual agency space needs and to determine the appropriate allocation of space in accordance with private sector standards and industry best practices.

One commenter requested that the preliminary text establishing the scope of application of the definitions contained in §122.1 be clarified and that a definition be provided for the phrase, "General Space Allocation Guidelines." TBPC has made the requested changes.

§122.2.

One commenter described the process detailed in §122.2 as logical, efficient, and consistent with the best interest of state agency space utilization. No change was necessary in response to this comment.

Another commenter noted that §122.2(b) was confusing due to references to internal TBPC programs and operations and requested the provision be clarified. As requested, TBPC has revised this language.

This commenter also found §122.2(c) could be read as implying TBPC had sole discretion to determine space allocation, rather than requiring TBPC to adhere to the statutory requirement of consistency with private sector standards and industry best practices. To clarify its intent and to avoid any confusion regarding its statutory authority, TBPC has deleted the reference to sole discretion.

§122.3.

One commenter stated that §122.3 and the General Space Allocation Guidelines appear to be more flexible and beneficial, enabling for a more logical and systematic approach to evaluating individual agency space needs. No change was necessary in response to this comment.

Another commenter correctly pointed out that, while §122.3 provides for general space allocation waivers, it does not establish an appeal process. TBPC agrees that an appeals process is appropriate and has revised Section 122.3 by adding subsection (g) which provides for an appeal to the Executive Director and to the full Commission. Thus, state agencies will have the opportunity to present their views and opinions to the highest level of decision making at TBPC.

A third commenter also pointed out that §122.3(a) misstates the standard as "most efficient manner possible," rather than the standard of "best and most efficient possible" established by statute. In conformity with legislative requirements and to minimize confusion, TBPC has added language accurately stating the appropriate standard.

The commenter correctly stated that, although §122.3 refers to General Space Allocation Guidelines, such guidelines are not incorporated into the new Chapter 122. As requested, TBPC has included a definition of the phrase "General Space Allocation Guidelines," in §122.1(11) which provides the Internet address on TBPC's web site where these guidelines may be referenced.

This commenter correctly stated that the language concerning the General Space Allocation Guidelines, exceptions, and waivers could be reorganized and simplified to enhance understanding. In particular, the commenter noted that language contemplating a strict application of general guidelines appeared inherently contradictory. TBPC has clarified this language, as requested, by deleting the adjective "strict." TBPC has also reorganized §122.3(d) - (g) to improve clarity.

TBPC has made other grammatical and word changes that do not affect the substance of the proposed rules. TBPC has also made additional formatting changes to enhance clarity and to provide additional ease of use.

The new rules are adopted pursuant to Texas Government Code §2165.104(c), relating to facilities planning and space allocation. These rules incorporate the statutory requirement that TBPC allocate space to governmental entities in a manner consistent with private sector standards and industry best practices.

§122.1. Definitions.

The following words and terms, when used in this chapter and in studies and reports conducted pursuant to Government Code, Chapter 2165, Subchapter C, and General Space Allocation Guidelines, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative Support--Administrative support technicians, aides, receptionists.

(2) Agency Director--The highest-ranking executive officer with full-time responsibility for the operations of the agency.

(3) Agency Employee--The full-time equivalent (FTE) of a person performing services on site under the direction of a state agency, including hours worked by full-time employees, part-time employees, and consultant and contract individuals as defined by the state auditor; including employees paid from funds maintained outside the treasury and hours worked by volunteers performing necessary services. Requests must include all contract and volunteer employees' work-hours and functions.

(4) Agency Site--A building or building complex on a single site or under a single lease contract, where agency business is transacted or services are provided.

(5) Agency Space Allocation--The area assigned to an agency calculated on the basis of Gross Area less the following areas:

(A) Space designated and regularly used for public activities, including ancillary space such as lobbies, corridors, toilet rooms and refreshment areas associated with the public space. This does not include lobbies and other space ancillary to space primarily intended for internal use by FTE's in the course of interfacing with clients, or to accommodate occasional visits by members of the public;

(B) Vertical shafts or chases used for circulation (elevators or stairs) or mechanical, electrical, telecommunication, or data cabling distributions;

(C) Mechanical, electrical, telecommunication, and data cabling rooms which house equipment serving more than a single tenant; and

(D) Other areas which are not relevant to tenant agency functions.

(6) Circulation Space--Percentage added to open or built-out spaces to provide adequate egress within allocation.

(7) Commission--The Texas Building and Procurement Commission.

(8) Division Director--The secondary managerial level, deputy directors, department directors who generally report to the agency director.

(9) Facilities Request Portal--Central internet site where application for all facilities-related work shall be requested. Services available through the Facilities Request Portal include: leased or state owned space assignments; space planning and feasibility studies; real estate market studies; new construction; modifications and alterations of state owned and leased facilities; exclusion requests for modifications to state owned or leased facilities; inspections and surveys; and architectural/engineering services or consultations. The internet address for the Facilities Request Portal is: http://portal.tbpc.state.tx.us/fcsm/facilityfrontpage.asp.

(10) File Areas--Open or built-out spaces containing active vertical or lateral file cabinets required to be readily accessible for daily agency operations. Closed files should be located in appropriate archival, non-office, facilities.

(11) General Space Allocation Guidelines--Guidelines used by TBPC in analyzing agency needs and configuration and quantity of space. The internet address for the General Space Allocation Guidelines is http://www.tbpc.state.tx.us/facplan/index.html.

(12) Gross Area--Gross Floor Areas shall be the area within the inside perimeter of the outside walls of the building with no deduction for hallways, stairs, closets, interior wall thickness, columns, or other features. When floors open to an atrium, the inside finished surface of the walls enclosing the atrium shall be used in lieu of an outer building wall.

(13) Office Machine Areas--Centrally located open or built-out spaces for copiers, network printers, faxes, and/or scanners.

(14) Professional/Manager--Attorneys, architects, engineers, doctors, or third level managerial positions with supervisory responsibilities who generally report to the secondary managerial level.

(15) Space Allocation Ratio--The mathematical result of dividing the occupying agency's Space Allocation by the total number of agency employees per site.

(16) Space Use Study--A study conducted by the commission to determine space requirements for state agencies.

(17) Special Areas--Spaces required for agency mission-specific operations, such as clinical showers, evidence rooms, mechanized file systems, public record review areas, video observation rooms, hearing rooms, centralized computer network operation rooms, print shops, centralized supply cabinets, and/or warehouse spaces exceeding 1,000 square feet of non-office space.

(18) State Agency--A department, commission, board, office of other agency in the executive branch of state government created by the state constitution or a state statute; the supreme court, the court of criminal appeals, a court of appeals, the Texas Judicial Council; and a university system or an institution of higher education as defined by §61.003, Education Code, except a public junior college.

(19) Technician/Program Administrator--Staff positions with technical, analytical or program administrative duties which may include fourth level managerial duties.

(20) Usable Office Space--That area of space as defined in paragraph (5) of this section, computed by measuring from the finished surface of the office side of a corridor and/or permanent wall, to the center of partitions that separate interior spaces from adjoining Usable Areas, and the inside finished surface of the dominant portion of the permanent outer building walls.

(21) Waiver--TBPC's decision to allow more square feet for an Agency Space Allocation than the General Space Allocation Guidelines provide.

§122.2. Requests for Allocation, Relinquishment, or Modification of Space in Facilities under the Commission's Control.

(a) Requests for allocation, relinquishment, or modification of space in facilities under the Commission's control shall be submitted via the TBPC Facilities Request Portal by an authorized agency representative. The internet address for the Facilities Request Portal is: http://portal.tbpc.state.tx.us/fcsm/facilityfrontpage.asp. Requests shall include the following information:

(1) Statement of justification including increased number of FTEs and the name of the agency unit; inadequacy of current facilities; lease expiration; and other reasons relevant to the request for facility space changes;

(2) Certification that funds are authorized and available to accomplish the requested action;

(3) Identification of action requested including whether the request adds, relinquishes, or modified state-owned space; and other reasons relevant to the request;

(4) Desired location including: location of current facility; location of requested facility; or special needs relevant to the request;

(5) Term of need to include: short-term (48 months or less) or long-term (specify duration); date occupancy or action is needed; and other critical schedule factors;

(6) Present occupancy status of subject agency program describing whether the unit is now housed in state-owned (name and address of facility), state-leased, or not housed; present lease number; number of current FTEs and agency's current square footage;

(7) Special conditions related to critical agency functions that require facility services beyond regular business hours, or other relevant factors; and

(8) Requesting agency contact and telephone and fax numbers for agency program requiring space or modification.

(b) The requesting agency shall work with TBPC to establish space allocation standards for the agency's particular tasks and functions.

(c) The TBPC will grant or deny a request in writing. TBPC's decision on the request is final.

§122.3. Space Allocation.

(a) General. The TBPC is required to allocate space to state agencies based on best space planning practices for specific functional needs in the best and most efficient manner possible.

(b) Applicability. Sections 122.1 - 122.3 of this title apply to TBPC's actions under Government Code, Chapter 2165, Subchapter C and to office space, warehouse space, laboratory space, storage space exceeding 1,000 gross square feet, boat storage space, certain aircraft hangar space, vehicle parking space; and a combination of those types of space. These rules apply whether the facility is state-owned or leased.

(c) Exemptions. This section does not apply to:

(1) residential space for Texas Health and Human Services Commission or the Texas Youth Commission;

(2) space utilized for less than one month for meetings, conferences, seminars, conventions, displays, examinations, auctions, or similar purposes;

(3) a site where it is not practical to apply this section because there are too few employees or because of the need for a particular type or use of the space;

(4) radio antenna space;

(5) district office space for members of the legislature;

(6) residential property acquired by the Texas Department of Housing and Community Affairs or the Texas State Affordable Housing Corporation; or

(7) classroom and instructional space except as provided by Government Code §2167.007.

(d) General Space Allocation Guidelines. Each request for allocation, relinquishment or modification of agency space will be evaluated in Space Use Study to determine functionally specific requirements. The Space Use Study will be based on space allocation determined by space planning criteria and design standards. Such criteria and standards shall relate directly to tasks for which space is being allocated and shall be updated regularly to reflect changes in best management practices, office equipment, personnel policies and for consistency with private sector standards and industry best practices. The

TBPC may allocate usable office space in amounts greater than that provided by the General Space Allocation Guidelines when:

(1) particular agency tasks require a specific design response not otherwise categorized;

(2) application of the General Space Allocation Guidelines to a given site is not practical; or

(3) the best financial interest of the state allows for greater space.

(e) Waivers of General Space Allocation Guidelines. Waivers may be granted where the agency is willing to accept different quality space at less cost in exchange for a greater amount of space; or the agency will accept space in a different location at a lower cost in exchange for a greater amount of space; or there is less market flexibility in the market, as in rural areas. Waivers may also be granted because of the particular needs of the agency programs.

(f) Request for Waiver. An agency request for a waiver from General Space Allocation Guidelines must be submitted, in writing, and must:

(1) describe the reason that the General Space Allocation Guidelines are not practical for the particular needs of the agency at the particular location; and

(2) discuss the financial impact of the requested waiver.

(g) Appeal of TBPC Space Allocation Determination. A state agency may appeal TBPC's space allocation determination by a written request for review from the Executive Director, or equivalent position, of the state agency to the Executive Director of the TBPC. The request must be received at TBPC within 14 days of the state agency's receipt of TBPC's space allocation decision. If the state agency is not satisfied with the decision of the TBPC's Executive Director, then the state agency may, within 14 days of the decision, request a review by the Commission at a scheduled public meeting of the Commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 23, 2005.

TRD-200506107
Ingrid Hansen
General Counsel
Texas Building and Procurement Commission
Effective date: January 12, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 463-7829

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CHAPTER 122. FACILITIES PLANNING
SUBCHAPTER B. SPACE ALLOCATION

1 TAC §122.3

The Texas Building and Procurement Commission (TBPC) adopts the repeal of 1 TAC Chapter 122, Subchapter B, §122.3, concerning the space allocation program. The repeal is adopted without changes to the proposal as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7323).

This repeal is adopted because a new Title 1, Chapter 122 was simultaneously proposed in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7324) and is being adopted elsewhere in this issue. The new Chapter 122 revises the TBPC's space allocation program rules to conform to 2005 legislative changes, reorganizes the sections for enhanced clarity and ease of use, and emphasizes allocation of space in a manner consistent with private sector standards and industry best practices.

These rules are being repealed to allow new rules to go into effect.

No comments were received regarding the repeals.

The repeals are adopted under Texas Government Code §2165.104(c) authorizing the TBPC to adopt rules relating to the space allocation program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 23, 2005.

TRD-200506106
Ingrid Hansen
General Counsel
Texas Building and Procurement Commission
Effective date: January 12, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 463-7829

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 17. MARKETING AND PROMOTION
SUBCHAPTER D. CERTIFICATION OF FARMERS MARKET

4 TAC §17.72

The Texas Department of Agriculture (the department) adopts amendments to §17.72, concerning renewal dates for the registration and certification of farmers markets by the department, without changes to the proposal published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7331).

The amendments are adopted to change the annual renewal period from April 1 through April 30 to February 1 through February 28, with an expiration date of March 31 of the following year, rather than May 31. The amendments will allow the department to gather and print current market information for consumers by the beginning of the farmers market season, rather than after the season begins. The amendments also provide that application forms will be available only from the state headquarters in Austin.

No comments were received on the proposal.

The amendments are adopted under Texas Agriculture Code (the Code), §12.016, which provides the department with the authority to adopt rules as necessary for the administration of its powers and duties under the Code; and the Code, §12.0175,

which provides that the department, by rule, may establish programs to promote and market agricultural products and other products grown, processed, or produced in the state, and adopt rules necessary to administer a program established under this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2005.

TRD-200506041
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: January 10, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 50. 2004 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.24

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of §§50.1 - 50.24, without changes to the proposal as published in the September 2, 2005, issue of the *Texas Register* (30 TexReg 5165) concerning the 2004 Housing Tax Credit Program Qualified Allocation Plan and Rules.

The sections are repealed in order to enact new sections conforming to the requirements of regulations enacted under the Internal Revenue Code of 1986, §42 as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306; and the Internal Revenue Code of 1986, §42 as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs and Executive Order AWR-92-3 (March 4, 1992), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

No other code, article or statute is affected by this proposed repeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506094
Edwina Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 11, 2006
Proposal publication date: September 2, 2005
For further information, please call: (512) 475-4595

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CHAPTER 50. 2006 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.23

The Texas Department of Housing and Community Affairs adopts new §§50.1 - 50.23, with changes to the proposed text as published in the September 2, 2005, issue of the *Texas Register* (30 TexReg 5166), concerning the 2006 Housing Tax Credit Program Qualified Allocation Plan and Rules. The new sections are necessary to provide procedures for the allocation by the Department of certain housing tax credits available under federal income tax laws to owners of qualified rental housing developments.

At the August 19, 2005, Board Meeting, the Board approved the Proposed New Title 10, Part 1, Chapter 50 - 2006 Draft Housing Tax Credit Program Qualified Allocation Plan and the proposed repeal of the Title 10, Part 1, Chapter 50 - 2004 Housing Tax Credit Program Qualified Allocation Plan and Rules for public comment. The proposals were published in the *Texas Register* on September 2, 2005, for the public to provide comments. In order to receive additional comments on all proposed rules, the Texas Department of Housing and Community Affairs staff held public hearings in the cities of Lubbock, Abilene, Arlington, Mt. Pleasant, Crockett, Houston, Austin, Temple, San Antonio, Corpus Christi, McAllen, Midland and El Paso. 97 people attended these hearings.

Reasoned Response to Public Comment on the 2006 Draft Qualified Allocation Plan (QAP)

The Department received the majority of comments in writing by email, fax and mail. Copies of the exact comment letters provided are available on the Department's website.

§50 - General - (2,8,9,10,11,12,14,18,19,20,21,25,26,27,28)

Comment:

Substantial comment asks that the Board consider creating a subcommittee with responsibility over the Qualified Allocation Plan. Comment suggested that the time element for getting a QAP approved is very restrictive and Board involvement "sooner rather than later" may be valuable (2,8,9,10,11,12,14,19,25,26,27).

Comment was received from an official from the City of Fort Worth requesting that the draft QAP remain consistent with the 2005 QAP. This next cycle is going to be very, very important to the City of Fort Worth, with the City of Dallas having a moratorium on their housing tax credits according to the commenter; therefore, it is important that municipal officials understand the complete nature of the program (18).

One comment from the National Housing Trust asserts that the first step to resolving America's affordable housing problem is to

preserve the affordable housing we already have. While the demand for affordable rental housing remains high, the supply of this housing is shrinking. In Texas alone, approximately 19,300 HUD-assisted apartments were lost between 1995 and 2003. At this time 385 projectbased Section 8 properties with 31,796 assisted units will expire in Texas before the end of Fiscal Year 2009. In the wake of Hurricane Katrina, preservation is especially important. Comment further commends TDHCA on its successful efforts to preserve and improve existing, affordable housing in Texas (21).

Comment also request that, when feasible, green technologies and methods should be integrated into rehabilitation in order to improve energy efficiency, conserve water and other resources, and use healthy building materials. These types of improvements benefit both residents and property owners through utility savings and lower maintenance costs, result in longterm sustainability, and provide residents with a better and healthier living environment (21).

Other comment asserts that all federal housing programs, including the tax credit program, must further the national policy of integrated housing by considering the racial and socio-economic impact of their funding decisions and that TDHCA is not furthering this policy in its rules. Multiple sources of law were referenced to indicate that TDHCA is obliged to affirmatively further the policies of Title VIII by promoting racial integration and collecting data to permit it to assess its compliance with anti-discrimination housing laws. The commenter notes that a significant majority of the QAP provisions are dictated by state legislation, and TDHCA has very little authority to alter the statutory provisions. However, comment asserts that as an entity that receives and distributes federal funds, TDCHA is required to act affirmatively to end racial segregation and to stem the tide of urban "ghettoization" (20).

Staff Response:

Staff appreciates the commendation relating to Department efforts in preservation and energy efficiency. As it relates to the comment suggesting that the Draft QAP remain consistent with the 2005 QAP, staff agrees and has worked to limit significant changes to enable applicants to feel some sense of continuity between the 2005 and 2006 rules. Regarding the comment received requesting that TDHCA's Board create of a subcommittee with responsibility over the QAP, staff recommends no change to the QAP because the creation of a subcommittee is at the Board's discretion and is not an item that would require language be added to the QAP for it to be accomplished. Staff also does not recommend any changes relating to fair housing or anti-discrimination because efforts and incentives to address these issues are already included in the QAP.

Staff has also administratively deleted the term "transitional" as a target population throughout the QAP (because the points for this population had been removed), unless specifically relating to the use of the term under §42(i)(3)(B)(iii) of IRS Code. In cases where the term remains in the QAP, this section of the Code is now referenced. Additionally, staff added, "Intergenerational Housing" as a specific population served throughout the QAP consistent with the inclusion of that term in the Draft QAP. These changes are highlighted as blackline changes in the QAP, but are not shown throughout this document.

Board Response:

The Board accepted Staff's recommendation.

§50.2 - Coordination with Rural Agencies (24), Page 3 of 65

Comment:

Comment supports the efforts of the Agency to coordinate its programs with other rural agencies, especially the Rural Housing Service, United States Department of Agriculture (24).

Staff Response:

Staff appreciates the positive feedback.

Board Response:

The Board accepted Staff's recommendation.

§50.3(13) - At-Risk (28), Page 4 and 5 of 65

Comment:

Comment recommends, without a stated rationale, changing the definition of At-Risk to remove the term "nearing expiration" in subclause (i) and the clarifying language that defines what "nearing expiration" means and remove the term "or is nearing the end of the mortgage term" in subclause (ii) and the clarification that defines "nearing the end."

Staff Response:

Staff does not recommend any revisions to the definition of At-Risk because the current language is necessary to ensure consistency in administering the set-aside.

Board Response:

The Board accepted Staff's recommendation.

§50.3(22) - Community Revitalization Plan (2,6,8,9,10,11,12,14,25,26,27,30), Page 5 of 65

Comment:

A significant amount of comment was received asserting that the 7 points for the rehabilitation of a building within a community revitalization plan in the draft 2006 QAP have become much more difficult to achieve. Many communities have official plans, but their revitalization needs are outlined as part of a greater land use plan and they do not have a tool called a "Community Revitalization Plan." Comment suggests that the 2005 language be used again instead of the 2006 draft language (2,6,8,9,10,11,12,14,25,26,27).

Further comment points to the requirement that the draft definition requires the plan to target funds to specific geographic areas. In some communities, such a policy could be found to be in violation of the intent of Fair Housing laws and encourages clustering of low-income housing in certain areas of a town or city. A city or county HUD-approved "Community Revitalization Plan" that encourages the development of low-income housing throughout the city should be given just as much credence as a plan that designates specific areas for low-income housing. It is requested that the language barring plans that preclude an entire town or city as a geographic area to be served by low-income housing from this definition be removed (30).

Staff Response:

While the Department appreciates that some city or county documents will not qualify for points requiring Community Revitalization Plans, staff does not agree that it would be prudent to revert to using an undefined term. Defining the term provides less subjectivity for administrative reviews and provides clear requirements for the applicant community. No deletion of the definition is recommended. However, staff does agree that the term

should not preclude an entire town or city as a geographic area. Therefore, staff recommends the following language which removes the requirement for local funds and allows an entire town or city as a geographic target area:

Board Response:

The Board accepted Staff's recommendation.

§50.3(49) - Definitions - Ineligible Building Types (2,8,9,10,11,12,13,14,19,22,25,26,27,28,30), Page 7 of 65

Comment:

Substantial comment commends the Board and staff for the revised compromise definition which allows developers greater flexibility and latitude in determining a proper unit mix based on local need, including an option for 4 bedrooms. This is particularly important in the border regions where a need for 2, 3 and 4 bedroom units has been identified. Additionally, to address the needs of those displaced by Hurricane Katrina, three and four bedroom units are in high demand (2,8,9,10,11,12,13,14,19,22,25,26,27,30). One comment also recommends allowing up to 10% of the units as 4 bedroom units; however it should be noted that this comment was made before the draft QAP allowing 5% was released (28).

Staff Response:

Staff appreciates the positive feedback relating to the revised definition. While Staff appreciates the arguments for 10% of the units as 4 bedrooms, the Department's Board has indicated that the draft language provides for appropriate unit mixes. Therefore, staff recommends no change. However, an administrative change was made to clarify the wording of the Intergeneration Housing Policy in the definition with the following change:

Board Response:

The Board accepted Staff's recommendation.

§50.3(60) - Definitions - Persons with Special Needs (2,6,8,9,10,11,12,14,15,19,25,26,27), Page 8 of 65

Comment:

Substantial comment requests an amendment to this section to address the housing needs for the many Katrina evacuees. It is requested that the Definition of Persons with Special Needs be amended to include individuals and families displaced as a result of Hurricane Katrina (2,6,8,9,10,11,12,14, 15,19,25,26,27).

Staff Response:

Staff concurs with the recommendation, although it recommends less restrictive language as follows:

Board Response:

The Board did not approve staff's recommendation to add populations identified as impacted by federal and state declared disasters and instead approved the language in the 2006 Draft QAP.

§50.3(73) - Definitions - Rehabilitation (3), Page 10 and 11 of 65

Comment:

Comment refers to the last sentence in the Rehabilitation definition that states adding a housing unit is considered New Construction. In effect, for rural applications this means that if a unit is added, the project is limited to 76 units and no new units can be added to potentially aid with tenant relocation during rehabilitation. Comment suggests that the definition of Rehabilitation be revised to either delete the last sentence in the definition of Rehabilitation or to add an exception to Rehabilitation projects that add new units to exceed 76 units in rural communities if the additional housing units are supported by a market study (3).

Staff Response:

Staff does not recommend a change to this definition. The restriction in rural areas to 76 units or less for developments involving new construction has been strongly supported over the years. Additionally, this change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur.

Board Response:

The Board accepted Staff's recommendation.

§50.3(73) - Definitions - Rural Area (30), Page 10 of 65

Comment:

Comment does not believe that the Department's acceptance of the "Section 516 Farm Labor Housing Grants for Off-Farm Housing" program into paragraph (C) of this definition meets the intent of the statute. The program is not limited to areas typically defined by USDA as rural. It is commented that these awards in metropolitan areas, as determined by the Department, fall under the Rural allocation and take credits away from other developments located in rural areas. Comment requests that the Department disallow Section 516 Housing developments unless they are built in an area of the state that is generally eligible for other funding by the Texas Rural Development (TX-USDA-RHS) Office (30).

Staff Response:

Staff recommends no change. The definition for a Rural Area as defined in §2306.6702 of the Texas Government Code indicates that a Rural Area includes "an area eligible for new construction or rehabilitation funding by TX-USDA-RHS." This language does not exclude any RHS programs. In considering this comment, staff found no support that any TX-USDA-RHS program was intended to be excluded from the legislated definition. In fact, since many of the other RHS programs are consistent with the definition, it appears it was intentional to include all RHS programs. Therefore, staff's determination is that any application which could provide evidence that it is a recipient of RHS funding meets the definition for a Rural Area as recommended by staff.

Board Response:

The Board accepted Staff's recommendation.

§50.3(87) - Definitions - Unit (15), Page 11 of 65

Comment:

Comment requests clarification of what square footage qualifies for a 4 bedroom loft or studio and points to the fact that the square footages conflict with the selection criteria in §50.9(i)(4), suggesting that they should match (15).

Staff Response:

Staff concurs with this comment and recommends the following language:

Board Response:

The Board accepted Staff's recommendation.

§50.5(a)(10) -Ineligibility (2,6,8,9,10,11,12,14,19,20,25,26,27)

Comment:

This item requires that a local resolution of support is needed if the application is located in a census tract that has in excess of 500 units supported by tax credits. Substantial comment suggests deletion of this item because this is unfair to all applicants in these areas and housing development should be based on need and not arbitrary tests of location (2,6,8,9,10,11,12,14,19,25, 26,27). One comment supports the draft language because it affirmatively furthers fair housing with the caveat that TDHCA should amend the draft language to exempt bond and 4% applications that have already received a bond reservation prior to the effective date of the new QAP (20).

Staff Response:

While the Department does support any reasonable and narrow efforts to ensure dispersion, it has been determined that the Department's underlying data relating to census tracts is not sufficiently refined due to changes in census tracts over the past 17 years. Therefore, in order to ensure that no item of ineligibility under this section would require any unwarranted termination caused by the unrefined data, staff recommends that this subparagraph be deleted. However, it should be noted that staff does continue to support efforts to ensure dispersion and will recommend this or similar language for the 2007 QAP.

Board Response:

The Board accepted Staff's recommendation.

§50.5(a)(11) -Ineligibility (2,6,8,9,10,11,12,14,19,20,25,26,27)

Comment:

Comment believes that this rule is unfair and the practical elimination of any new construction in regions 3,6,7 or 9 because city council approval would be limited and are required by this proposal. Given the hurricane evacuee displacement to these major markets and the high occupancies now being experienced in affordable developments in these markets, it is inadvisable to have a practical prohibition on new construction in these areas and it should be deleted. This would be the most devastating proposed change to the QAP (2,6,8,9,10,11,12,14,19,20,25,26,27).

Staff Response:

Staff appreciates the significant comment received and recognizes the significant negative impact this restriction will have. Therefore, staff recommends the deletion of the proposed language.

Board Response:

The Board accepted Staff's recommendation.

§50.6(d) - Credit Amount (28), Pages 15 and 16 of 65

Comment:

Comment recommends altering the $2 million tax credit cap to allow housing authorities to count pro rata on a unit/credit basis toward their $2 million cap. The following language is recommended to be added, "This provision does not apply to housing authorities as only those units that are reserved for public housing will count toward the $2 million developer cap for housing authorities (28)."

Staff Response:

Staff recommends no change to this section. This change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur.

Board Response:

The Board accepted Staff's recommendation.

§50.6(f) - Limitation on the Location of Developments (7,28), Page 16 of 65

Comment:

Comment recommends increasing the one mile rule to three miles for senior developments, and exempting At-Risk deals from the one mile rule while making bond-financed developments comply with the one mile rule (7,28).

Staff Response:

Staff recommends no change. This rule is based on statute and the Department has no authority to make this change.

Board Response:

The Board accepted Staff's recommendation.

§50.6(g) - Rehabilitation Costs (2,8,9,10,11,12,14,25,26,27,28,30), Page 16 of 65

Comment:

Substantial comment suggests that TDHCA should work to encourage rehabilitation, and the mandatory minimum of $12,000 will do the opposite in cases where the development warrants significant rehabilitation, but does not warrant such a high level. Comment suggests adding that the $12,000 be considered met if a Property Condition assessment states it can be done for less (2,8,9,10,11,12,14,25,26,27). One comment supports the increase to $12,000 because it will further ensure that projects actually undergo some substantial rehabilitation, as opposed to nothing more than painting or other minor cosmetic work being done on existing buildings (30). An additional comment, received prior to the release of the draft QAP, encouraged increasing the rehabilitation cost minimum to $10,000 per unit (28).

Staff Response:

Staff recommends no change. Consistent with national trends and other housing finance agencies, analysis confirms existing rehabilitations generally exceed the $12,000 limit unless they are USDA-RHS which are already exempt from this requirement. The Department, as a policy, wants to ensure a thorough and significant rehabilitation as it contributes resources.

Board Response:

The Board accepted Staff's recommendation.

§50.7(a) - Regional Allocation Process (30), Page 17 of 65

Comment:

Comment supports the changes being proposed by staff that will require a TX-USDA-RHS deal to file a notification of "Intent to Request Tax Credits" by the pre-application deadline. This requirement will allow the development community to make better decisions about applying for projects in the regional areas of the state without spending tremendous amounts of money, time and effort chasing deals in rural areas that really have no chance of being funded (30).

Staff Response:

No change is recommended. Staff appreciates the positive feedback.

Board Response:

The Board accepted Staff's recommendation.

§50.7(b) - Set-Asides (2,6,7,8,9,10,11,12,14,20,25,26,27,28), Page 17 of 65

Comment:

One comment was submitted requesting that the State contemplate transferring 5% of credits from the other 12 regions to Beaumont and Port Arthur to offset potential costs due to Hurricane Rita. The comment also suggests that TDHCA ask for federal approval to donate an additional 5% of our tax credits to Louisiana. The net effect would add about 24% to the overall credits available in Louisiana, enough to allow them to do about 400 more units of affordable housing, and would increase the credits available in Beaumont/Port Arthur by almost 150% (20).

Substantial comment requested establishing "Exurban" Set-Asides. Regions 3, 6, 7, and 9 have sufficient allocation to support an exurban Set-Aside and a 10% Set-Aside in these four regions would ensure that at least one exurban project in each of these regions would be funded. However, in the other nine regions an exurban Set-Aside of 10% would prompt the same criticism that accompanies the At Risk Set-Aside where a single project takes 100% of the funds, far exceeding the 15% amount. An alternative suggestion is to maximize the number of credits that can go to an Urban area in Regions 3, 6, 7, and 9 so that it could require that no more than a certain percentage of the funds in these Regions go to Urban Projects (2,6,8,9,10,11,12,14,25,26,27).

Additional comment supports TDHCA giving special attention through Set-Asides (At-Risk and Elderly) because many projects would otherwise be overlooked and not funded, thus creating greater disparity in housing (7). One comment recommends the creation of a Set-Aside for non-rural areas where there has been no tax credit development in the past and where said areas have an income over the area median family income in an effort to integrate affordable housing into existing neighborhoods (28).

Staff Response:

Staff does not recommend any changes to this section. In regards to comment requesting establishing exurban and non-rural set-asides, this change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur. Additionally, staff does not agree that the Department should transfer any credits to offset national and state disasters because it is more appropriate to await the federal response to be generated for hurricane relief. Staff appreciates positive feedback relating to the At-Risk set-aside. However, it should be noted that, contrary to comment, there is no elderly set-aside in the draft QAP.

Board Response:

The Board accepted Staff's recommendation.

§50.7(b)(1) - Nonprofit Set-Aside (10,11,12,22, 28,30), Page 17 of 65

Comment:

Several comments suggest allowing housing agencies to compete in the Nonprofit Set-Aside without the requirement that the nonprofit retain 80% of the developer fee because for small-to-medium housing agencies it is necessary to find a development partner who has experience in the tax credit industry. These agencies do not have the staff resources to complete an application and continue the development process on their own (10,11,12).

Another comment also opposes the proposed language because it limits the number of nonprofits that will be able to participate in the HTC program; the language will only benefit a handful of the best capitalized nonprofits around the state. Many nonprofit groups do not have the capability to provide the financial guarantees necessary to develop large housing projects; however they do benefit significantly in a partnership with an experienced co-developer (22).

Another comment supports the change because it defines the Managing General Partner in a way that clearly states the level of involvement for the nonprofit in the development process. Further, it is suggested that the Set-Aside be only for 100% nonprofit applications and that all applications involving joint ventures be considered in the general application pool (28).

Another comment requests further clarification regarding consulting fees. The proposed language requires that applications in the nonprofit set-aside allow at least 80% of the developer fees to go to the non-profit applicant, but it is unclear as to whether or not the nonprofit applicant will be allowed to pay out consulting fees that amount to greater than 20% of the developer fees. If this is the intent of the change, comment requests that language be added to that affect. If this is not the intent, comment requests further clarification to that affect, as currently the Real Estate Analysis division considers all consulting fees part of the developer fee for underwriting, carryover and cost-certification purposes (30).

Staff Response:

Much of the comment recommended the deletion of the proposed requirement that 80% of the developers fee be provided to the nonprofit in order to compete in the nonprofit set-aside as it may exclude some nonprofits with lesser experience. Based on this rationale, and the Department's efforts to guarantee that no types of nonprofits are excluded, staff recommends the deletion of the language and recommends reverting to the 2005 language.

Board Response:

The Board accepted Staff's recommendation.

§50.7(b)(2) - At-Risk Set-Aside (5, 21), Page 17 of 65

Comment:

One commenter requested that if there is an At-Risk applicant in a region that would receive preference over another application that this be made known at the start of the process so that agencies won't spend the time and money to put together a competitive application (5). Additional comment received from a national organization applauds TDHCA on the specific Set-Aside for the preservation of at-risk affordable housing, and encourages this Set-Aside in the 2006 and future rules (21).

Staff Response:

Staff recommends no change. Staff is already recommending the proposed comment in the current draft QAP. Staff appreciates the positive feedback as it relates to preservation.

Board Response:

The Board accepted Staff's recommendation.

§50.8(d)(3) - Pre-Application Threshold Criteria (Administrative change), Page 18 of 65

Staff Response:

Staff has added administrative changes to the draft language so that a certification is acceptable evidence for this section which relates to the pre-application notification process. The language was changed as follows:

Board Response:

The Board accepted Staff's recommendation.

§50.8(d)(3)(B) - Pre-Application Threshold Criteria Notification Requirements (2,4,6,8,9,10,11, 12,14,15,19,20,22,25,26,27,28,31), Page 19 of 65

Comment:

Significant comment throughout the state requests that the requirement to identify and notify "other impacted neighborhood associations" as indicated under this section be omitted. This is too vague and not required under the statute (2,6,8,9,10,11,12,14,19,22,25,26,27,31). Similarly, "other impacted neighborhood organizations" could be organizations for areas of a town substantially far from the development and that any organization, no matter how far away, can claim to be impacted. If the language remains in the 2006 QAP, it is requested that there be clarification as to how to identify these neighborhood organizations and from whom they would be requested (4, 15).

Comment was also received that asserts that notification provisions in the QAP contravene any move to decentralize affordable housing into the suburbs. The effect of the notification provisions is to facilitate negative support from neighborhoods organizations that do not want affordable housing in their neighborhoods and to galvanize opposition to affordable apartment developments, particularly in affluent neighborhoods. It was suggested that the notice requirements violate the Fair Housing Act (20). Comment was also received that recommends using the language from H.B. 1167 regarding notification of neighborhood organizations. Neighborhood organizations should be registered with the state by December 31st (28).

Staff Response:

Staff does not recommend the language from H.B. 1167 regarding the notification of neighborhood organizations. The language as drafted ensures that current statutory requirements are met and that all neighborhood organizations that are on record with the city or county are notified up to the final application submission. Staff appreciates the extensive comment received relating to "other impacted neighborhood organizations" and recommends the deletion of the language throughout the Draft QAP relating to this item to improve the clarity of the requirement. Staff also has added administrative changes to the draft language so that a certification is acceptable evidence for all of this section and to clarify the requirements for neighborhood organizations' notifications [note, the deletions and administrative additions apply to both this section and the notification requirements at full application in §50.9(h)(8).]

Board Response:

The Board accepted Staff's recommendation.

§50.9(c) - Adherence to Obligations (2,8,9,10,11,12,14,19,25,26,27), Pages 20 and 21 of 65

Comment:

Substantial comment suggests that, while it is rare, sometimes an applicant may deliver a product that is significantly different from that proposed. In this case, language should be added to this section that would result in one-year debarment, a fine imposed equal to ten percent of the amount of the annual credit allocation allocated, and the applicant must submit a plan to incorporate additional amenities to compensate the tenants for the deficiency which could be approved at the staff level (2,8,9,10,11,12,14,19,25,26,27).

Staff Response:

The Department concurs that a penalty should be applied to applicants that make significant variations from their proposed product without prior Department approval. While the following proposed language does not mirror exactly what comment suggested, staff is recommending a proposed penalty that we feel is sufficient and can be smoothly administered. Because this clause was not included in the draft QAP, it is now recommended to be included to essentially "give notice" to the applicant community that this will become the policy in the future, but reflects that it will not become effective until December 1, 2006.

Board Response:

The Board accepted Staff's recommendation.

§50.9(f) - Evaluation for Rural Rescue Applications Under the 2007 Credit Ceiling (16,24), Pages 23 and 24 of 65

Comment:

One comment requests that staff consider expanding the rural rescue program to the distressed HOME loan tax credit projects around the state. This would give one more potential tool for solving problems (16). Comment also commends the Department for maintaining the rural rescue policy. It is strongly encouraged that the policy be enhanced by using forward commitments against each total regional allocation for the following year for properties that obtain a commitment under the rural rescue procedure. This enhancement would be consistent with the treatment of other forward commitments issued by the Department (24).

Staff Response:

Staff appreciates the positive feedback regarding the rural rescue policy. Staff does not recommend a change to this section to expand rural rescue to HOME developments because HOME developments are under a different set of rules compared to USDA applications and should have the time available to compete in the 2006 HTC round. Based on the feedback of the rural development community, Section VI of the Rural Rescue Policy (also on the November 2005 Board agenda) has been revised to reflect that the Rural Rescue applications will still be deducted from the Rural Regional Allocation for the following year, but will not be deducted from the USDA Allocation. This will enable several more USDA applications to compete for credits during the 2007 application round.

Board Response:

The Board accepted Staff's recommendation.

§50.9(g) - Experience Pre-Certification (28,30), Page 24 of 65

Comment:

Comment supports the current draft language that allows less-experienced organizations to qualify for tax credits by adding a new percentage requirement for smaller tax credit allocations (28). Comment also suggests that the threshold for the builder's or developer's experience requirement should include a required 50 houses registered with the Texas Residential Construction Commission (TRCC). As an active participant in the development of the enabling legislation for the creation of the TRCC, the commenter believes that residents of low-income housing built with TDHCA funds should receive the benefits of the TRCC Act by barring anyone from TDHCA programs who is not in good standing with the TRCC (30).

Staff Response:

Staff recommends no change to this section. This change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur.

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(4)(A)(ii)(XX) - Threshold Criteria - Certification of Amenities (17), Pages 26 of 65

Comment:

Comment was received requesting in a broader array of recreational amenities for amenities offered to Qualified Elderly Developments to potentially include lawn bowling, croquet courts, or bocce ball courts (29).

Staff Response: Staff concurred and added language.

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(4)(F) - Threshold Criteria - Architect Certification (29), Pages 27 and 28 of 65

Comment:

Comment was received from the Texas Society of Architects which suggests that the QAP seems to mistake the responsibilities of architects for those of contractors. While architects are solely responsible for designing buildings in conformity with the laws of Texas, their responsibility during the construction phase of the project is markedly different. Once the architectural plans and specifications are prepared, the contractor is responsible for implementing the construction of those plans and specifications. Therefore, comment implies that this section of the QAP should be changed so that the architect is certifying the designs and specifications of the buildings, but not the proper completion of the development. A post-application form may be submitted by another architect when the buildings are placed in service indicating that the buildings are compliant with the QAP (29).

Staff Response:

Staff concurs with comment and recommends the following changes to the QAP:

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(4)(J) - Certification of Not Providing Assistance (2,4,6,8,9,10,11,12,14,15,17,19,22,25, 26,27), Page 28 of 65

Comment:

Please note that a full summary of comment relating to this item is found later in this document in "§50.9(i)(2)(A)(vi) - Quantifiable Community Participation."

Staff Response:

Due to changes recommended later in this document in "§50.9(i)(2)(A)(vi) - Quantifiable Community Participation", staff recommends the following language be added to this section:

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(6)(G) - Threshold Criteria - Site Work Costs (22), Page 29 of 65

Comment:

Comment received requests that the $7,500 limit for site work be raised to a higher amount of between $9,000 and $11,000 to reflect the reality of the condition of current multi-family sites available for development (i.e. need for rezoning and greater due diligence). This amount has not been increased in many years (22).

Staff Response:

Staff does not recommend a change. This safe harbor limit at $7,500 per unit is intended to account for more than the average historical site work cost on a per unit basis. Anything over that amount will still be accepted as long as substantiation for the significantly higher than average site work cost is provided. Relatively few developments exceed this guideline and the additional administrative work required to process the qualified third party verification is considered to be an important safeguard in evaluating costs with difficult site issues.

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(7)(A)(iii)(II)(b)(1) - Threshold Criteria - Evidence of Readiness to Proceed (30), Page 29 of 65

Comment:

Comment supports these changes regarding recognizable costs to be allowed in an identity of interest land transaction, however it suggests that the language go further to specifically allow for increased values due to zoning changes. Currently, if a landowner owns a parcel of land that was zoned Agricultural or Residential when acquired, the acquisition cost plus only basis costs are acknowledged for underwriting, carryover and cost certification purposes. If a land owner chooses to re-zone a parcel of land to apartment or commercial zoning in a desirable part of a city, the current TDHCA policy discourages the landowner from placing that parcel into a tax credit deal because any value added purely from the re-zoning is rejected by the department. Therefore, the current TDHCA policy discourages developers from putting more valuable parcels of land into tax credit deals because the developer cannot realize the true value of the parcel of his/her land in the transaction. This policy is not in the best interest of the program, as many deals are not presented on more valuable parcels of land due to this current TDHCA policy (30).

Staff Response:

Staff does not recommend a change to this section. Cost to the related party seller to rezone the site is allowed as a holding cost that is then added to the original acquisition cost included in the development cost schedule. The contract price between

the related party seller and applicant may reflect the perceived value added by the change in zoning; however, for purposes of calculating the gap-based recommended tax credit allocation, total acquisition cost will be calculated based on the proposed language of §50.9(h)(7)(A)(iii).

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(8)(A) - Threshold Criteria - Notification Requirements (Administrative Changes), Page 31 of 65

Staff Response:

Staff has added administrative changes to the draft language so that a certification is acceptable evidence for all of this section in a method consistent with pre-application. The language was changed as follows:

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(8)(ii) -Threshold Criteria - Notification Requirements (2,4,6,8,9,10,11,12,14,15,19,20, 22,25,26,27,28,31), Page 32 of 65

Comment:

Please see §50.8(d)(3)(B) - Pre-Application Threshold Criteria Notification Requirements, for duplicative comment.

Staff Response:

Staff recommends the following changes based on that comment and administrative changes:

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(8)(B) - Threshold Criteria - Notification Requirements (20), Page 33 of 65

Comment:

Comment asserts that signage requirements contravene any move to decentralize affordable housing into the suburbs. The effect of the signage provision is to facilitate negative support from neighborhoods organizations that do not want affordable housing in their neighborhoods and galvanize opposition to affordable apartment developments, particularly in affluent neighborhoods. It was suggested that the notice requirements violate the Fair Housing Act (20).

Staff Response:

Staff does not recommend a change to this section. Signage is the best method of notifying a community of the proposed development and encourage public participation.

Board Response:

The Board accepted Staff's recommendation.

§50.9(h)(9)(D) - Threshold Criteria - National Previous Participation (15), Page 34 of 65

Comment:

One comment suggests that to notify other states, particularly when the involved agency no longer exists, is a burden for an applicant who has not had any activity in that other state for many years. It is suggested that this only be required for transactions during the last ten (no more than fifteen) years (15).

Staff Response:

Staff recommends no change to this section. Prompted by this public comment, staff performed a legal review of §2306.057 of Texas Government Code which requires that a compliance history be performed on all applications. Staff has determined that it does not have the authority to limit the scope of the review to any amount of time. Therefore, the review is only limited to individual states' retention schedules.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i) - Selection Criteria - General (2,6,8,9,10,11,12,14,19,20,25,26,27), Pages 38-49 of 65

Comment:

Substantial comment suggests the compression of the scoring range to level the playing field for applications in areas with no neighborhood associations on record. It still follows the legislated order of priority, but by lowering the Community Participation total, it is easier to achieve equity in areas of discretion to the Board. Suggested point changes are as follows (2,6,8,9,10,11,12,14,19,25,26,27).

Selection Item

§50.9(i)(1) - Financial Feasibility

Points in 2005: 28

Suggested 2006: 20

§50.9(i)(2) - Quantifiable Community Participation

Points in 2005: 24

Suggested 2006: 18/9/0

§50.9(i)(3) - Income Levels of Tenants

Points in 2005: 22/20/18/16/14

Suggested 2006: 16/14/12/10/8

§50.9(i)(4) - Size and Quality of the Units

Points in 2005: 20 (6/14)

Suggested 2006: 15 (3/12)

§50.9(i)(5) -Funding from Local Political Subdivision

Points in 2005: 18/12/6

Suggested 2006: 14/10/6

§50.9(i)(6) -Support from State Elected Officials

Points in 2005: 14 (7 each)

Suggested 2006: 12 (6 each)

§50.9(i)(7) - The Rent Levels of the Units

Points in 2005: 12/10/9/8/7

Suggested 2006: 11/10/9/8/7

§50.9(i)(8) - Cost of the Development by Square Foot

Points in 2005: 10

Suggested 2006: 10

§50.9(i)(9) - Services Provided to Tenants

Points in 2005: 8

Suggested 2006: 9

Comment suggests an option "below the line" to offset QCP points might be to award 8 points for applications where there is NO neighborhood association present. In these situations, the applicant could also qualify for the proposed 9 points (previously 12) provided in situations where there is no opposition from a neighborhood association. This section could be changed to simply address support/opposition/no response or neutral. This would allow an application in an area w/o neighborhood associations to achieve 17 points, but not the full 18 for Neighborhood Organization support (2,6,8,9,10,11,12,14,17,19,25,26,27). An alternative option would be to keep the point schedule from the Draft 2006 QAP and award 8 points for applications where there is no neighborhood association present. This would bring applications with no neighborhood associations within 4 points of their competitors with supporting organizations (2,6,8,9,10,11,12,14,17,19, 25,26,27).

Additional comment suggests a point-scoring item for Expired Affordable Properties which would allow a scoring incentive of approximately 5 points for developers to acquire and rehabilitate properties that were previously considered to be affordable (same definition as at-risk), but have already expired (25).

Comment was also received that requests a selection item which would counter balance notification requirements and selection criteria which encourage negative support from neighborhood organizations who do not want affordable housing in their neighborhoods (20).

Staff Response:

Staff recommends no changes to the QAP based on the comment above because this change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur. Additionally, staff is already awarding points to expired affordable developments by awarding points to developments proposed for reconstruction or rehabilitation under paragraph (15) of this subsection. Regarding comment received requesting a selection criteria item that would counter balance notifications requirements and negative support, staff does not have the authority to contravene legislation and cannot make the recommended change. An administrative change is recommended because of the scoring changes for QCP addressed below. The language is as follows:

Board Response:

The Board added the correct point minimum and maximum based on the approved 2006 QAP with Board amendments as follows:

§50.9(i)(2) - Quantifiable Community Participation, General (2,6,8,9,10,11,12,14,19,20,25,26, 27,28,31), Page 38 through 40 of 65

Comment:

As indicated in the General Selection Criteria section (above), substantial comment suggests the compression of the scoring range to level the playing field for applications in areas with no neighborhood associations on record. It is recommended that this section would decrease from the draft QAP's point value of 24 (+12 for strongest support, 0 for neutral letters or no letter to -12 for strongest opposition) to a recommended value of 18 for strongest support, 9 for neutral or no letter and 0 for the strongest opposition (2,6,8,9,10,11,12,14,19,25,26,27,28).

According to the research of one commenter, 29 out of 33 (88%) of the Urban applications in 2005 were successful on the basis of their QCP scores. Based upon these results they further predict that there will be some very clever "discoveries" of neighborhood organizations in rural allocations in 2006 as well and without some meaningful modifications to the current and proposed rules regarding QCP, the vast majority of successful HTC applications in Texas will be determined almost exclusively by their QCP scores. Comment further questions whether this was the intent of the legislature. Further, the commenter questions if is it fair for the vast majority of rural communities in Texas who do not have legitimate neighborhood organizations to be abandoned by the HTC program (31).

Comment was also received that asserts that point incentives in the QAP for neighborhood support contravene any move to decentralize affordable housing into the suburbs. The points facilitate negative support from neighborhood organizations that do not want affordable housing in their neighborhoods and galvanizes opposition to affordable apartment developments, particularly in affluent neighborhoods. A high level of opposition is not normally seen in the lower income, primarily minority areas and developers choose to avoid higher income areas with opposition. In a typically tight scoring matrix for the award of tax credits, the points provide an institutionalized mean for eliminating affordable housing in certain neighborhoods. It was suggested that the point incentives violate the Fair Housing Act (20).

Comment recommends giving full community participation points to developments where there is no qualified community organization. If a qualified organization exists but does not respond, then the developer should receive full points (28).

Staff Response:

As it relates to affirmatively furthering fair housing, QCP is a legislated requirement and staff cannot remove it as a scoring item. Additionally, while the Department appreciates that a majority of applications who received points in 2005 were in the urban/exurban allocation, because all rural applications compete with one another and not the urban/exurban allocations, staff considers the concerns of rural competing with urban/exurban unwarranted. The Department does not feel that it can allow points for QCP if a neighborhood organization does not exist because the statute is clear that these points are for QCP from neighborhood organizations. However, rather than have a range from +12 to -12, staff is recommending a range from +24 to 0. Therefore staff recommends the following language change to this section:

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(2)(A)(ii) - Quantifiable Community Participation (2,6,8,9,10,11,12,14,19,25,26,27), Page 39 of 65

Comment:

Substantial comment requests a "second contact" for the neighborhood organization since many of these associations use a home fax or phone number as contact. (2,6,8,9,10,11,12,14,19,25,26,27).

Staff Response:

Staff concurs with the comment which adds a second contact, which would allow for a faster response time from neighborhood organizations. Therefore, staff recommends the following language:

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(2)(A)(iv) - Quantifiable Community Participation (17,22,28,31), Page 39 of 65

Comment:

Comment suggests allowing resident councils to be recognized if it is rehabilitation or demolition/new construction within their existing boundaries (22). Other comment supports allowing all resident's councils to be considered for the points for this item (28).

Additional comment suggests that a property owners association should qualify for QCP, no matter what the stage of the development of the master-planned community. QCP points for this kind of situation should not be prohibited just because the master-planned community may contain some sort of commercial element or because the community and residences are under development. If the developer is willing to support an affordable housing complex as part of the community, that makes a huge statement. To avoid potential abuse, the QCP points in this scenario should only be permitted if: (1) the developer of the master-planned community is unrelated to the applicant and (2) the proposed affordable housing development will take up no more than 10% of the total land mass of the master-planned community. That way, developers won't create master-planned communities just to give themselves QCP points (15,17).

Comment recommends the language from HB 1167 from the 79th Legislature concerning the boundaries of neighborhood associations in relation to elementary school zones be adopted (28,31). Comment suggests that the use of the language from HB 1167 eliminates the ambiguities in defining what an acceptable Neighborhood Organization is. It also removes the responsibility from staff in determining whether or not a Neighborhood Organization is legitimate. Furthermore, it eliminates the probability that rural communities without legitimate neighborhood organizations will be abandoned because points are not attainable (31).

Staff Response:

Staff does not recommend language that would allow master-planned communities because no "neighbors" live in the development community during the application phase. Thus, "neighborhood" input from organizations whose boundaries include the proposed development site is impossible. Additionally, staff has determined that because HB 1167 did not pass, we are precluded from incorporating the recommended HB1167 language because it violates current legislation. Staff does concur with comment that suggests allowing resident councils to be recognized if it is rehabilitation or demolition with new construction within their existing boundaries.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(2)(A)(v) - Quantifiable Community Participation (28), Page 39 of 65

Comment:

Comment suggests that neighborhood associations should be on file with the county or state as of December 31st of the year preceding the year in which the tax credits will be awarded. If allowable under current statute, organizations on file with the municipality should qualify for notification and scoring purposes as well (31).

Staff Response:

While staff recognizes that the requirements may be confusing, it is statutorily required that an organization be on record with the county or state (not city) in order to potentially qualify as an eligible neighborhood organization for the purposes of this section. Staff does not recommend changes to this section.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(2)(A)(vi) - Quantifiable Community Participation (2,4,6,8,9,10,11,12,14,15,17,19,22, 25,26,27), Page 39 of 65

Comment:

Substantial comments request clarification that a Developer can provide assistance in the form of educating a neighborhood association as to the process for support (or opposition) and that this can include such nominal forms of assistance as making available a fax or postage or shipping, provided the Developer does not exercise control over the association (2,6,8,9,10,11,12,14,17,19, 25,26,27).

Further comment asserts that the proposed language for this section is too limiting and would not allow neighborhood organizations to obtain necessary information from the applicant when needed. There need to be opportunities for the applicant to provide information about the proposed development on a continuous basis throughout the application process, host neighborhood meetings as needed, provide the TDHCA Quantifiable Community Participation information packet to neighborhood organizations, provide samples of support letters, provide transportation, secretarial services, delivery services, uses of computer, as needed or requested by neighborhood organizations (22).

Other comment requests that the prohibition of providing assistance to a neighborhood organization be removed because neighborhoods are very sensitive to HTC developments and often many meetings are required with board members and then neighborhood members. Convincing a group to support an HTC development requires charts, handouts, explanations of the process and sometimes making changes to the development to satisfy the organization's requested changes. Generally the neighborhood organizations are unsophisticated and do not have counsel (4). Without applicant assistance, very few neighborhood organizations will positively respond and even fewer will respond to deficiency letters, a result not intended with the selection criteria points. Perhaps the phrase needs to be couched in terms of Applicant not being allowed to give assistance that personally benefits any individual(s), however assistance that benefits the neighborhood organization is not a prohibited activity (15).

Staff Response:

Staff recognizes that this process will be more successful if the Department allows some involvement with neighborhood organizations, while not encouraging improper conduct as it relates to seeking out points for QCP.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(2)(A)(viii) - Quantifiable Community Participation (2,6,8,9,10,11,12,14,19,25,26,27), Page 40 of 65

Comment:

Substantial comment objects to the requirement that Neighborhood Associations submit bylaws. The State of Texas does not require an organization to have bylaws and many of the smaller, less sophisticated Neighborhood Associations do not have bylaws. It should be sufficient to ask a Neighborhood Association to produce its organizational documents in whatever form they exist. (2,6,8,9,10,11,12,14,19,25,26,27).

Staff Response:

Staff concurs with the comment and recommends the following language:

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(2)(C) - Quantifiable Community Participation (2,6,8,9,10,11,12,14,19,25,26,27), Page 40 of 65

Comment:

Substantial comment suggests that the Neighborhood Association be given 10, rather than 7, days to respond. These are not businesses, they are informal groups and accommodation needs to be made for a slower pace in responding to requests for information (2,6,8,9,10,11,12,14,19,25,26,27).

Staff Response:

Staff does not recommend a change to the requirement that the neighborhood organizations be given 10, rather than 7, days to respond to Department because the suggested extended deadline would delay the Department's finalization of scores of applications which would correspondingly delay the administration of the Application Round. However, staff believes that because a second contact has been added for neighborhood organizations, the effect will allow for allow for a sufficient response time from neighborhood organizations.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(4)(B) - Quality of the Units (2,6,7,8,9,10,11,12,14,19,21,22,24,25,26,27,28), Page 41 of 65

Comment:

Comment supports points for masonry on exterior walls, energy efficient alternative construction materials, extra insulation, and Energy Star rated refrigerators and dishwashers. Comment further encourages TDHCA to award points for plans that incorporate water conservation techniques (21). Comment supports fire sprinklers in 100% of the units (7,28). Additional comment suggests keeping current 2005 QAP language regarding ceiling insulation (22). The draft QAP removes the use of thirty year shingles as a scoring component for the quality of units. Additional comment recommends that for rehabilitation developments the 30 year shingles remain as a quality of the unit scoring component. Without this possibility, it will be extremely difficult for rehabilitation developments to achieve a competitive score (24).

Staff Response:

Staff appreciates positive feedback relating to this item. While water conservation techniques are important, this change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur. However, staff does concur that the 30 year shingles remain as a scoring component in an effort to help Rehabilitation developments achieve a competitive score and also agrees that the 2005 language relating to ceiling insulation should be added back into the QAP. Therefore, the following new language is recommended (note that subsequent items are renumbered accordingly):

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(5) - Commitment of Funding from a Local Political Subdivision (2,3,4,6,7,8,9,10,11,12,14, 15,19,22,24,25,26,27,28), Pages 42 and 43 of 65

Comment:

Substantial comment requests that the date for proving up local funds continue to be at the time of the Acceptance of the Commitment Letter rather than May 1, 2006. Many communities do not commit these funds until June and many are reluctant to commit until they know which applications are actually going to receive tax credits. The May 1 date is not realistic for a major metropolitan area like Houston or San Antonio (2,3,6,8,9,10,11,12,14,15,19,22,25,26,27).

Clarification was requested relating to multi-jurisdictional Housing Finance Corporations (HFCs) and whether or not HFCs that serve multiple (30 or 40) counties will be considered eligible funding entities under this section. Additionally, if the Department continues with the interpretation that TDHCA HOME funds cannot be used in non-Participating Jurisdiction areas as local funding, can a city apply for HOME funds concurrently with a tax credit application and state in their application that the funds will be used as local funding for a particular application (25)?

Comment requests clarification of the draft language for the circumstance in which the Local Political Subdivision is the Developer. According to the definition, a housing authority counts as a Local Political Subdivision, but can they use their Capital Grant funds to get points in this category? In many rural areas, the PHA is the only public entity that has any funds to leverage, so this could be a problem if they can't (6).

Significant comment received suggests that this is a scoring item that favors the large cities over the smaller ones. Generally, the funds provided to meet this requirement come from City HOME or CDBG funds, which are only available in the larger cities, also known as Participating Jurisdictions. One idea for achieving equity is to allow TDHCA's HOME Funds to count for these points in communities that do not have HOME allocations, i.e. non-Participating Jurisdictions, as was allowed in the 2005 QAP, but stricken in the draft 2006 QAP (4). Substantial comments suggests that if HOME funds, which come from HUD regardless of whether they go to the City for allocation or to the State for Allocation, are considered local when distributed by a City, they should be considered "local" when they are distributed by TDHCA. We understand that considering TDHCA and ORCA as "Local Political Subdivisions," is odd, however, they are recognized as the Participating Jurisdiction and Entitlement Area for the balance of the State. By acting as such, TDHCA and ORCA are fulfilling the function of a local agency for these areas (2,3,6,8,9,10,11,12,14,19, 25,26,27).

Comment supports the clarification of the points available from local political subdivisions. However, it recommends that the points be allowed only for substantial and meaningful develop-

ment funding. Thus, rather than use a specific dollar amount for specific points, it is recommend that 6 points be allowed for a contribution equal to 5% of the total development cost per low-income unit, 12 points for a contribution equal to 10% of the total development cost per low-income unit, and 18 points for a contribution equal to 15% of the total development cost per low-income unit (24).

The remaining comment below relates to the section that was §49.9(g)(5)(B), which is stricken in the current draft:

Substantial comment suggests that TDHCA continue to allow rental vouchers to qualify for these points because as a group, it is important that the playing field stays fair and even between nonprofit providers, housing authorities, and for-profit developers (2,3,6,7,8,9,10,11,12,14,19,22,25,26,27). Other comment asserts that local commitment Vouchers are the only way that deep targeted units allow the developments to be financially feasible (22). Further comment suggests that the majority of our smaller communities have a housing authority and this is one area where non-urban projects actually stand a chance of qualifying for some or all of these points. A project-based voucher can indeed result in reducing the need for outside funds. For instance, in many communities, the Housing Choice Voucher Rent is higher than the TDHCA 30% or 50% program rent. In these cases the higher rent can be used to reduce the need for permanent mortgage funds (2,3,6,8,9,10,11,12, 14,19,25,26,27).

Comment requests that the development based vouchers be kept as part of the QAP with a due date of November 1, 2006. If the date was moved to November 1 for complying with the HUD rules and regulations governing development based vouchers, it would be easier to keep development based vouchers as a scoring type of funding from local political subdivisions. (3).

Comment suggests that if the section currently stricken which allows for points for development-based Housing Choice, rental assistance vouchers, or rental assistance subsidy approved by the Annual Contributions Contract (ACC) is added back in that the Section 8 commitment preference for local housing authorities be made available to all applicants. Project based section 8 should carry forward for everyone, not just housing authorities (28).

Staff Response:

Staff does not recommend the substantial increase in development funding because staff considers the current language to be sufficient. Based on the events of 2005 and the ultimate ease of administration, staff also does not believe a change is needed relating to multi-jurisdictional Housing Finance Corporations (HFCs). As with all questions relating to whether or not a specific entity qualifies, staff recommends that specific questions be addressed to staff for a determination on the eligibility of the entity. Staff concurs with the recommendation that the date for proving up local funds continue to be at the time of the acceptance of the Commitment Letter and recommends that the associated language relating to this item be re-inserted. Staff also recommends that TDHCA HOME funds qualify for this item in non-Participating Jurisdictions as long as a resolution from the Local Political Subdivision is received at application that authorizes the applicant to act on behalf of the Local Political Subdivision in applying for HOME funds. Staff also recommends language that would allow an Applicant to qualify for these points if the applicant itself is a Local Political Subdivision or its subsidiary. Staff does not believe that it has the statutory authority to include the points for vouchers. Therefore, the following recommendation to this section is as follows:

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(6) - Level of Support from State Elected Officials (2,6,8,9,10,11,12,14,19,20,25,26,27), Page 43 of 65

Comment:

Comment was also received that asserts that point incentives in the QAP for elected official support contravene any move to decentralize affordable housing into the suburbs. In a typically tight scoring matrix for the award of tax credits, the points provide an institutionalized mean for eliminating affordable housing in certain neighborhoods. It was suggested that the point incentives violate the Fair Housing Act (20).

Staff Response:

Staff recommends no changes to the current draft as it relates to this comment. The Department cannot remove the item because it is statutory. However, in order to be consistent with the recommended changes for the QCP point structure, staff does recommend reverting to the original 2005 language for this section.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(8) - Cost of the Development by Square Foot (2,6,8,9,10,11,12,14,19,25,26,27,28), Page 43 of 65

Comment:

Comment asserts that there are generally two types of elderly housing produced: 1) duplex/fourplex for more mobile seniors and 2) larger buildings with elevators, interior hall space, etc., for less mobile seniors. Specifically the larger building types result in approximately 26-28% of community space (compared to 2 % for general properties), which is used in the calculation of total costs, but is not considered when determining cost per square foot. When determining the eligible costs per square foot for scoring item 8, this differential should be considered and result in a high cost per square foot than is proposed for elderly developments (25). Another comment recommends increasing construction costs for new construction by 5 percent (28).

Staff Response:

In order to truly evaluate the effects of the proposed revisions relating to the two types of elderly households and the calculation of cost per square foot, staff recommends that further research and discussion occur. Staff also recommends an administrative change to increase the costs per square foot limitations equally from 2005 to 2006 in the wake of documented rising construction costs. Staff recommends the following language:

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(9) - Services to be Provided to Tenants of the Development (2,6,8,9,10,11,12,14, 19,25,26,27,28), Page 44 and 45 of 65

Comment:

Comment supports the current draft language because it provides additional services to residences, thus increasing resident retention and fewer vacancies (28).

Staff Response:

Staff recommends no change. Staff appreciates the positive feedback.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(13) - Development Location (20), Page 45 of 65

Comment:

Comment suggests that TDHCA has failed to establish and implement an institutionalized method for considering the social and demographic data when making their tax credit award decisions. Therefore, assuming that point scoring is further utilized to further integration, the following revisions should be made so that the scoring item recognizes that the selection of a development site in a predominately non-minority, suburban area can involve risks for a developer related to potential community opposition that may not be encountered to the same degree with other sites, and provides an incentive to a developer to assume these risks in order to provide a high quality housing opportunity in such areas for the families that are eligible for tax credit units. Comment suggests striking all language relating to designated state or federal empowerment zones, urban enterprise community and urban enhanced enterprise community. Additionally, comment would strike point incentives for a Development located in an "Exemplary" or "Recognized" school zone, as well as the section that awards points for expanding affordable housing opportunities for families with children outside of poverty areas. Additional language is recommended that would disperse housing to areas with low minority ratios (20).

Staff Response:

Staff does not recommend a change to this item because the QAP already addresses dispersion and affirmatively furthers fair housing. Additionally, this change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(13)(F) - Development Location (20), Page 45 of 65

Comment:

Comment supports this item in the QAP for giving preference to high income census tracts (20).

Staff Response:

Staff recommends no change and appreciates the positive feedback.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(15) - Tenant Populations with Special Needs (2,6,8,9,10,11,12,14,15,19,25,26,27), Pages 45 and 46 of 65

Comment:

Substantial comment requests that any applicants receiving points for serving special needs populations should be required to "hold these units open" for a period of 12 months (2,6,8,9,10,11,12,14,19,25,26,27). Additional comment requests clarification for a situation when an applicant elects this provision and then can't fill the unit. TDHCA should clarify how long this set-aside is applicable. It also requests a definition of Special Needs be defined (15).

Staff Response:

Staff concurs with comment that clarification is needed for this item, and staff recommends the following language:

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(17) - Site Characteristics (1,23), Pages 46 and 47 of 65

Comment:

Comment requests that points for a rural health clinic with a full service medical, dental, and vision be added (23). Another comment requests a change to the language of this section in order to make the required site characteristics more accessible to persons with disabilities (1).

Staff Response:

Staff recommends no added language relating to a rural health clinic because there is already language in the draft QAP as suggested. Staff does recommend the proposed changes to allow for more accessibility as follows:

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(18) - Development Size (2,6,8,9,10,11,12,14,19,24,25,26,27), Page 47 of 65

Comment:

Substantial comment requests that the current draft language which allows 3 points for projects not greater than 36 units be increased to the size of 76 units and make this a 5 or 6 point item. This will result in greater dispersion of the units within the regions and generally developments targeted for smaller communities are smaller in size (2,6,8,9,10,11,12,14,19,25,26,27). Further comment from the Rural Rental Housing Association supports maintaining the 36 unit limitation contained in this section for scoring of development size (24).

Staff Response:

Staff recommends no change. This change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(19) - Qualified Census Tracts with Revitalization (28), Page 47 of 65

Comment:

Comment from a group representing community development corporations recommends creating general incentives in qualified census tracts for revitalization, senior, and at risk developments throughout the QAP. The commenter wants to encourage seniors development and the preservation and rehabilitation of low-income units in Qualified Census Tracts (QCTs) but does not encourage the construction of new family developments if the census tract has had new family units awarded recently (28).

Staff Response:

Staff recommends no change. The QAP already does provide general incentives for revitalization and At-Risk developments. Staff believes that the market should determine the target population of a development and that no further incentives are necessary to provide housing to elderly populations.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(20) - Sponsor Characteristics (2,6,8,9,10,11,12,14,19,25,26,27), Page 47 of 65

Comment:

Substantial comment received supports any efforts to broaden participation in the program to Historically Underutilized Businesses (HUBs), but does not support granting points to inexperienced developers. The comment suggests adding specific points for specific roles on the development team (2,6,8,9,10,11,12,14,19,20,25,26).

Staff Response:

The comment does not reflect the current draft language. However, staff recommends the following change that would ensure that points are not awarded for using HUBs if the applicant has a poor history of placing buildings in service or not issuing 8609s when awarded tax credits:

Board Response: In an effort to make this section specific only to encouraging the participation of HUBs in the HTC Program, the Board deleted staff's recommended language under (A) of this section. Additionally, the board reinserted the 2005 language with additional new language stipulating that the HUB must not meet the experience requirements of §50.9(g) and must partner with an experienced developer. The Board also added language allowing the experienced developer to not be subject to the $2 Million credit cap for one application per Application Round. The Board restructured this section as follows:

Additionally, the Board added the following clarifying language to the definition of Affiliate under §50.3(2) to allow for the experienced developer to not be subject to the $2 Million credit cap:

§50.9(i)(21) - Developments Intended for Eventual Tenant Ownership (7,28), Pages 47 and 48 of 65

Comment:

Comment recommends encouraging Unit Ownership by increasing points to 5 (7,28).

Staff Response:

Staff recommends no change. This change would be significant enough to warrant further public comment. In order to truly evaluate the effects of the proposed revisions, staff recommends that further research and discussion occur.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(22) - Leveraging of Private, State and Federal Resources (22), Pages 48 and 49 of 65

Comment:

Comment recommends that the date required for the commitment approved by the governing body of the entity should not be revised to May 1, 2006 and that the 2005 language remain. Many communities do not make their HOME/CDBG allocations until after that date. Comment also recommends amending this section to include a provision for circumstances wherein the Applicant is itself a local political subdivision or a subsidiary thereof (22).

Staff Response:

Staff cannot recommend that a provision be included that would allow points for an applicant who is a local political subdivision because a local political subdivision is not a private, state or federal resource. However, staff concurs with the recommendation to change the deadline and recommends the following language:

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(23) - Third Party Funding Commitment Outside of Qualified Census Tracts (22), Page 49 of 65

Comment:

Comment would like similar language added for this item as suggested in for item 22 above (22).

Staff Response:

Staff recommends no change because suggested language is not applicable to this section.

Board Response:

The Board accepted Staff's recommendation.

§50.9(i)(24)(B) - Scoring Criteria Imposing Penalties (15), Page 49 of 65

Comment:

Comment suggests that this should be limited to a removal with a time period limitation from the time the investor partnership agreement was executed such as six or seven years. After that time period, where one had satisfied the development requirements and guaranty requirements on operations, this penalty should not apply since situations do occur that are beyond the developer's control such as Katrina and Rita occurrences and other adverse market changes. Also by that time, the note is nonrecourse and the obligations to the investor are nonrecourse (15).

Staff Response:

Staff recommends no change because suggested language is already applied to this section. The current limit is five years.

Board Response:

The Board accepted Staff's recommendation.

§50.9(j) - Tie Breaker Factors (30), Pages 49 and 50 of 65

Comment:

Comment suggests that the proposed tie-breaker policy does not go far enough in distinguishing between two applications for the same type of construction in the same city. If two properties score the same, are both new construction and are both in the same city, the proposed policy will not untie the projects. It is proposed that a price per square foot or tax credits per square foot formula be added back in as the last tie-breaker item. It is acknowledged that many in the development community claim that this is not in the best interests of the program because it may promote substandard housing to be developed, however, com-

ment disagrees with this position because the QAP has plenty of safety measures in place. In addition, there is now a statewide building code in effect throughout the state to further ensure quality housing is built (30).

Another item proposed as a tie-breaker is an applicant's standing with the Texas Residential Construction Commission as a registered builder, or an applicant's status as a "Texas Star Builder" also designated by the Texas Residential Construction Commission (30).

Staff Response:

Staff does not recommend an imposed tie breaker relating to the applicant's standing with the Texas Residential Construction Commission. However, staff agrees that another tie breaker should be added to the QAP. Staff recommends the following language which incorporates last year's language as subparagraph (C) to this section:

Board Response:

The Board accepted Staff's recommendation.

§50.12(a)(1) - Filing of Applications for Tax-Exempt Bond Developments (Administrative), Page 54 of 65

Staff Response:

Staff made an administrative change to the language requiring a December 29th, 2005, 12:00 p.m. submission deadline under this section which is consistent with the requirement released in the TDHCA Bond Program instructions. Staff made the following revisions:

Board Response:

The Board accepted Staff's recommendation.

§50.17(c) - Challenges Regarding Applications (Administrative), Page 61 and 62 of 65

Staff Response:

Staff recommends the following change to revise the term "allegations" to "challenges" in this section:

Scoring Breakdown in Descending Order of Points for the Draft 2006 QAP

QAP Para.# : 1, Topic: Financial Feasibility, Total Points: 28, Notes: NA, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(A)

QAP Para.# : 2 , Topic: QCP from Neighborhood Organizations, Total Points: 24, Notes: Max Range of +24 to 0, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(B); §2306.6725(a)(2)

QAP Para.# : 3, Topic: Income Levels of the Tenants, Total Points: 22, Notes: NA, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(C) and (e); §2306.111(g)(3)(B) and (E); 42(m)(1)(B)(ii)(I)

QAP Para.# : 4, Topic: Size and Quality of the Units, Total Points: 20, Notes: NA, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(D); 42(m)(1)(C)(iii)

QAP Para.# : 5, Topic: Commit. of Funds by LPS, Total Points: 18, Notes: NA, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(E)

QAP Para.# : 6, Topic: State Elected Official Support/Opposition , Total Points: 14, Notes: Max Range of +14 to -14, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(F) and (g); §2306.6725(a)(2)

QAP Para.# : 7, Topic: Rent Levels of the Units, Total Points: 12, Notes: NA, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(G)

QAP Para.# : 8, Topic: Cost Per Square Foot, Total Points: 10, Notes: NA, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(H); 42(m)(1)(C)(iii)

QAP Para.# : 9, Topic: Services Provided to Tenants, Total Points: 8, Notes: NA, Legislative Citation - Compare to QAP: §2306.6710(b)(1)(I); Rider 7; §2306.254; §2306.6725(a)(1)

QAP Para.# : 10, Topic: Housing Needs, Total Points: 7, Notes: NA, Legislative Citation - Compare to QAP: 42(m)(1)(C)(ii)

QAP Para.# : 11, Topic: Existing Housing with Revitalization, Total Points: 7, Notes: NA, Legislative Citation - Compare to QAP: 42(m)(1)(C)(iii)

QAP Para.# : 12, Topic: Pre-Application, Total Points: 6, Notes: NA, Legislative Citation - Compare to QAP: §2306.6704

QAP Para.# : 13, Topic: Development Location, Total Points: 4, Notes: NA, Legislative Citation - Compare to QAP: §2306.6725(a)(4) and (b)(2); §2306.127; Rider 6 42(m)(1)(C)(i) and (vii)

QAP Para.# : 14, Topic: Exurban or Reconstruction or Rehabilitation, Total Points: 7, Notes: NA, Legislative Citation - Compare to QAP: §2306.6725(a)(4) and (b)(2); §2306.127; 42(m)(1)(C)(i)

QAP Para.# : 15, Topic: Special Housing Needs Populations, Total Points: 4, Notes: NA, Legislative Citation - Compare to QAP: 42(m)(1)(C)(v)

QAP Para.# : 16, Topic: Length of Affordability, Total Points: 4, Notes: NA, Legislative Citation - Compare to QAP: §2306.6725(a)(5); §2306.111(g)(3)(C); §2306.185(a)(1) and (c); §2306.6710(e)(2); 42(m)(1)(B)(ii)(II)

QAP Para.# : 17, Topic: Site Characteristics, Total Points: 4, Notes: Up to 4 points for positive amenities. Up to -5 points for negative features, Legislative Citation - Compare to QAP: NA

QAP Para.# : 18, Topic: Development Size, Total Points: 3, Notes: NA, Legislative Citation - Compare to QAP: NA

QAP Para.# : 19, Topic: Location in QCT with Revitalization, Total Points: 2, Notes: NA, Legislative Citation - Compare to QAP: 42(m)(1)(B)(ii)(III)

QAP Para.# : 20, Topic: Sponsor Characteristics, Total Points: 2, Notes: NA, Legislative Citation - Compare to QAP: 42(m)(1)(C)(iv)

QAP Para.# : 21, Topic: Right of First Refusal, Total Points: 1, Notes: NA, Legislative Citation - Compare to QAP: §2306.6725(b) 42(m)(1)(C)(viii)

QAP Para.# : 22, Topic: Leveraging of Private, State and Federal Funds, Total Points: 1, Notes: NA, Legislative Citation - Compare to QAP: §2306.6725(a)(3)

QAP Para.# : 23, Topic: Third Party Commitment Outside of QCT, Total Points: 1, Notes: NA, Legislative Citation - Compare to QAP: §2306.6710(e)(1)

QAP Para.# : 24, Topic: Penalties, Total Points: NA, Notes: Range, Legislative Citation - Compare to QAP: §2306.6710(b)(2)

Maximum Number of Points Possible: 209

Tab Number and Organization

1, Accessible Communities, Inc - Coastal Bend Center for Independent Living

2, Individual

3, Campbell & Riggs, P.C.

4, Churchill Residential

5, Individual

6, DMA Development Company

7, Individual

8, Individual

9, Individual

10, Individual

11, Individual

12, Individual

13, Individual

14, Investment Builders, Inc.

15, Individual

16, Individual

17, Locke Liddle & Sapp LLP

18, Individual

19, Individual

20, Munch Hardt Kopf & Harr, P.C.

21, National Housing Trust

22, NRP Group

23, Pilgram's Pride Affordable Housing Corporation

24, Rural Rental Housing Association

25, S. Anderson Consulting

26, SGI Ventures, Inc.

27, Texas Affiliation of Affordable Housing Providers

28, Texas Association of Community Development Corporations

29, Texas Society of Architects

30, Tropicana Builders

31, Individual

The new sections are adopted pursuant to the authority of Chapter 2306, Texas Government Code; and Section 42 of Internal Revenue Code of 1986, as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-92-3 (March 4, 1992), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

No other code, article or statute is affected by these new sections.

§50.1. Purpose and Authority; Program Statement; Allocation Goals.

(a) Purpose and Authority. The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of Housing Tax Credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, as amended, provides for credits against federal income taxes for owners of qualified low-income rental housing Developments. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Chapter 2306, Subchapter DD, Texas Government Code, the Department is authorized to make Housing Credit Allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed this Qualified Allocation Plan (QAP) which is set forth in §§50.1 - 50.23 of this title. Sections in this chapter establish procedures for applying for and obtaining an allocation of Housing Tax Credits, along with ensuring that the proper threshold criteria, selection criteria, priorities and preferences are followed in making such allocations.

(b) Program Statement. The Department shall administer the program to encourage the development and preservation of appropriate types of rental housing for households that have difficulty finding suitable, accessible, affordable rental housing in the private marketplace; maximize the number of suitable, accessible, affordable residential rental units added to the state's housing supply; prevent losses for any reason to the state's supply of suitable, accessible, affordable residential rental units by enabling the Rehabilitation of rental housing or by providing other preventive financial support; and provide for the participation of for-profit organizations and provide for and encourage the participation of nonprofit organizations in the acquisition, development and operation of accessible affordable housing developments in rural and urban communities. (2306.6701)

(c) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state, and in accordance with the regional allocation formula; to promote maximum utilization of the available tax credit amount; and to allocate credits among as many different entities as practicable without diminishing the quality of the housing that is being built. The processes and criteria utilized to realize this goal are described in §50.8 and §50.9 of this title, without in any way limiting the effect or applicability of all other provisions of this title. (General Appropriation Act, Article VII, Rider 8(e))

§50.2. Coordination with Rural Agencies.

To ensure maximum utilization and optimum geographic distribution of tax credits in rural areas, and to provide for sharing of information, efficient procedures, and fulfillment of Development compliance requirements in rural areas, the Department has entered into a Memorandum of Understanding (MOU) with the TX-USDA-RHS to coordinate on existing, Rehabilitation, and New Construction housing Developments financed by TX-USDA-RHS; and will jointly administer the Rural Regional Allocation with the Texas Office of Rural Community Affairs (ORCA). Through participation in hearings and meetings, ORCA will assist in developing all Threshold, Selection and Underwriting Criteria applied to Applications eligible for the Rural Regional Allocation. The Criteria will be approved by that Agency. To ensure that the Rural Regional Allocation receives a sufficient volume of eligible Applications, the Department and ORCA shall jointly implement outreach, training, and rural area capacity building efforts. (2306.6723)

§50.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative Deficiencies--The absence of information or a document from the Application as is required under §50.5, §50.6, §50.8(d) and §50.9(g), (h), (i) and (j) of this title.

(2) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest unless the entity is an experienced developer as described in §50.9(i)(20)(B) of this title.

(3) Agreement and Election Statement--A document in which the Development Owner elects, irrevocably, to fix the Applicable Percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Development Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(4) Applicable Fraction--The fraction used to determine the Qualified Basis of the qualified low-income building, which is the smaller of the Unit fraction or the floor space fraction, all determined as provided in the Code, §42(c)(1).

(5) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit, as defined more fully in the Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at 10 basis points above the greater of:

(i) the current applicable percentage for the month in which the Application is submitted to the Department, or

(ii) the trailing 1-year, 2-year or 3-year average rate in effect during the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based in order of priority on:

(i) The percentage indicated in the Agreement and Election Statement, if executed; or

(ii) The actual applicable percentage as determined by the Code, §42(b), if all or part of the Development has been placed in service and for any buildings not placed in service the percentage will be the actual percentage as determined by Code, §42(b) for the most current month; or

(iii) The percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(6) Applicant--Any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting a Housing Credit Allocation. (2306.6702)

(7) Application--An application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (2306.6702)

(8) Application Acceptance Period--That period of time during which Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department as more fully described in §50.9(a) and §50.21 of this title. For Tax-Exempt Bond Developments this period is that period of time prior to the deadline stated in §50.12 of this title, and for Rural Rescue Applications this is that period of time stated in the Rural Rescue Policy.

(9) Application Round--The period beginning on the date the Department begins accepting Applications for the State Housing Credit Ceiling and continuing until all available Housing Tax Credits from the State Housing Credit Ceiling (as stipulated by the Department) are allocated, but not extending past the last day of the calendar year. (2306.6702)

(10) Application Submission Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Pre-Applications and Applications for Housing Tax Credits.

(11) Area--An incorporated place or Census Designated Place as defined by the U.S. Census Bureau. Developments located outside the boundaries of a place shall use the Area definition of the closest place.

(12) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of the Code, §42.

(13) At-Risk Development--a Development that: (2306.6702)

(A) has received the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive under the following federal laws, as applicable:

(i) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. Section 17151);

(ii) Section 236, National Housing Act (12 U.S.C. Section 1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. Section 1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. Section 1701s);

(v) the Section 8 Additional Assistance Program for housing developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development;

(vi) the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development;

(vii) Sections 514, 515, and 516, Housing Act of 1949 (42 U.S.C. Sections 1484, 1485, and 1486); and

(viii) Section 42, of the Internal Revenue Code of 1986 (26 U.S.C. Section 42), and

(B) is subject to the following conditions:

(i) the stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years of July 31 of the year the Application is submitted); or

(ii) the federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years of July 31 of the year the Application is submitted).

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in subparagraph (A) of this paragraph will not qualify

as an At-Risk Development unless the redevelopment will include the same site.

(D) Developments must be at risk of losing all affordability on the site. However, Developments that have an opportunity to retain or renew any of the financial benefit described in subparagraph (A) of this paragraph must retain or renew all possible financial benefit to qualify as an At-Risk Development.

(E) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a qualified contract under Section 42 of the Code. Evidence must be provided in the form of a copy of the recorded LURA, the first years IRS Forms 8609 for all buildings showing Part II completed and, if applicable, documentation from the original application regarding the right of first refusal.

(14) Bedroom--A portion of a Unit set aside for sleeping which is no less than 100 square feet; has no width or length less than 8 feet; has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space.

(15) Board--The governing Board of the Department. (2306.004)

(16) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and Treasury Regulations, §1.42-6.

(17) Carryover Allocation Document--A document issued by the Department, and executed by the Development Owner, pursuant to §50.14 of this title.

(18) Carryover Allocation Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(19) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(20) Colonia--A geographic Area located in a county some part of which is within 150 miles of the international border of this state and that:

(A) has a majority population composed of individuals and families of low-income and very low-income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed Area under §17.921, Water Code; or

(B) has the physical and economic characteristics of a colonia, as determined by the Texas Water Development Board.

(21) Commitment Notice--A notice issued by the Department to a Development Owner pursuant to §50.13 of this title and also referred to as the "commitment."

(22) Community Revitalization Plan--A published document, approved and adopted by the local governing body by ordinance or resolution, that targets specific geographic areas for low-income residential Developments (serving residents at or below 60% of the area median income).

(23) Compliance Period--With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(24) Control--(including the terms "Controlling," "Controlled by", and/or "under common Control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(25) Cost Certification Procedures Manual--The manual produced, and amended from time to time, by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Developments placed in service under the Housing Tax Credit Program.

(26) Credit Period--With respect to a building within a Development, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(27) Department--The Texas Department of Housing and Community Affairs, an agency of the State of Texas, established by Chapter 2306, Texas Government Code, including Department employees and/or the Board. (2306.004)

(28) Determination Notice--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which states that the Development may be eligible to claim Housing Tax Credits without receiving an allocation of Housing Tax Credits from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Development before the Department will issue the IRS Form(s) 8609 to the Development Owner; and specifies the Department's determination as to the amount of tax credits necessary for the financial feasibility of the Development and its viability as a rent restricted Development throughout the affordability period. (42(m)(1)(D))

(29) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services (which fee cannot exceed 15% of the Eligible Basis) and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(30) Development--A proposed qualified and/or approved low-income housing project, as defined by the Code, §42(g), for New Construction or Rehabilitation, that consists of one or more buildings containing multiple Units, and that, if the Development shall consist of multiple buildings, is financed under a common plan and is owned by the same Person for federal tax purposes, and the buildings of which are either:

(A) located on a single site or contiguous site; or

(B) located on scattered sites and contain only rent-restricted units. (2306.6702)

(31) Development Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(32) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract approved by the Department. (2306.6702)

(33) Development Team--All Persons or Affiliates thereof that play a role in the development, construction, Rehabilitation, man-

agement and/or continuing operation of the subject Property, which will include any Development Consultant and Guarantor.

(34) Economically Distressed Area--Consistent with §17.921 of Texas Water Code, an Area in which:

(A) water supply or sewer services are inadequate to meet minimal needs of residential users as defined by Texas Water Development Board rules;

(B) financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) an established residential subdivision was located on June 1, 1989, as determined by the Texas Water Development Board.

(35) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis as defined in the Code, §42(d).

(36) Executive Award and Review Advisory Committee ("The Committee")--A Departmental committee that will develop funding priorities and make funding and allocation recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in Chapter 2306 of the Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities. (2306.1112)

(37) Extended Housing Commitment--An agreement between the Department, the Development Owner and all successors in interest to the Development Owner concerning the extended housing use of buildings within the Development throughout the extended use period as provided in the Code, §42(h)(6). The Extended Housing Commitment with respect to a Development is expressed in the LURA applicable to the Development.

(38) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. This party may also be referred to as the "contractor."

(39) General Partner--That partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(40) Governmental Entity--Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(41) Governmental Instrumentality--A legal entity such as a housing authority of a city or county, a housing finance corporation, or a municipal utility, which is created by a local political subdivision under statutory authority and which instrumentality is authorized to transact business for the political subdivision.

(42) Guarantor--Means any Person that provides, or is anticipated to provide, a guaranty for the equity or debt financing for the Development.

(43) Historically Underutilized Businesses (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(44) Housing Credit Agency--A Governmental Entity charged with the responsibility of allocating Housing Tax Credits pursuant to the Code, §42. For the purposes of this title, the Department is the sole "Housing Credit Agency" of the State of Texas.

(45) Housing Credit Allocation--An allocation by the Department to a Development Owner for a specific Application of Housing Tax Credits in accordance with the provisions of this title.

(46) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, that amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the affordability period and which it allocates to the Development.

(47) Housing Tax Credit ("tax credits")--A tax credit allocated, or for which a Development may qualify, under the Housing Tax Credit Program, pursuant to the Code, §42. (2306.6702)

(48) HUD--The United States Department of Housing and Urban Development, or its successor.

(49) Ineligible Building Types--Those Developments which are ineligible, pursuant to this QAP, for funding under the Housing Tax Credit Program, as follows:

(A) Hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and single room occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for Housing Tax Credits if the Development involves the conversion of the building to a non-transient multifamily residential development. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living.

(B) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments of two stories or more that does not include elevator service for any Units or living space above the first floor.

(C) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments with any Units having more than two bedrooms.

(D) Any Development with building(s) with four or more stories that does not include an elevator.

(E) Any Development proposing New Construction, other than a Development (New Construction or Rehabilitation) composed entirely of single-family dwellings, having more than 5% of the Units in the Development with four or more bedrooms.

(F) Any Development that violates the Integrated Housing Policy of the Department, §1.15 of this title.

(G) Any Development located in an Urban/Exurban Area involving any New Construction of additional Units (other than a Qualified Elderly Development and certain specific types of transitional housing for the homeless and single room occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) in which any of the designs in clauses (i) - (iii) of this subparagraph are proposed. For purposes of this limitation, a den, study or other similar space that could reasonably function as a bedroom will be considered a bedroom. For Applications involving a combination of single family detached dwellings and multifamily dwellings, the percentages in this subparagraph do not apply to the single family detached dwellings. An Application may reflect a total of Units for a given bedroom size greater than the percentages stated below to the extent that the increase is only to reach the next highest number divisible by four.

(i) more than 30% of the total Units are one bedroom Units; or

(ii) more than 55% of the total Units are two bedroom Units; or

(iii) more than 40% of the total Units are three bedroom Units.

(H) Any Development that includes age restricted units that are not consistent with the Intergenerational Housing definition and policy or a Qualified Elderly Development.

(50) Intergenerational Housing--Housing that includes specific units that are restricted to the age requirements of a Qualified Elderly Development and specific units that are not age restricted in the same Development that:

(A) have separate and specific buildings exclusively for the age restricted units

(B) have separate and specific leasing offices and leasing personnel exclusively for the age restricted units

(C) have separate and specific entrances, and other appropriate security measures for the age restricted units

(D) provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group

(E) share the same Development site

(F) are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) meet the requirements of the federal Fair Housing Act.

(51) IRS--The Internal Revenue Service, or its successor.

(52) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this chapter, Chapter 2306, Texas Government Code, and the requirements of the Code, §42. (2306.6702)

(53) Local Political Subdivision--A county or municipality (city) in Texas. For purposes of §50.9(i)(5) of this title, a local political subdivision may act through a government instrumentality such as a housing authority, housing finance corporation, or municipal utility.

(54) Material Noncompliance--As defined in §60.1 of this title.

(55) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and Controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin. (2306.6734)

(56) New Construction--Any Development not meeting the definition of Rehabilitation.

(57) ORCA--Office of Rural Community Affairs, as established by Chapter 487 of Texas Government Code. (2306.6702)

(58) Person--Means, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(59) Persons with Disabilities--A person who:

(A) has a physical, mental or emotional impairment that:

(i) is expected to be of a long, continued and indefinite duration,

(ii) substantially impedes his or her ability to live independently, and

(iii) is of such a nature that the disability could be improved by more suitable housing conditions,

(B) has a developmental disability, as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. Section 15002), or

(C) has a disability, as defined in 24 CFR §5.403.

(60) Persons with Special Needs--Persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers.

(61) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of the Application, including any required exhibits or other supporting material, as more fully described in §50.8 and §50.21 of this title. (2306.6704)

(62) Pre-Application Acceptance Period--That period of time during which Pre-Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department.

(63) Principal--the term Principal is defined as Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a ten percent or more interest in the corporation; and

(C) limited liability companies, Principals include all managing members, members having a ten percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(64) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(65) Qualified Allocation Plan (QAP)--

(A) As defined in §42(m)(1)(B): Any plan which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions; which also gives preference in allocating housing credit dollar amounts among selected projects to projects serving the lowest-income tenants, projects obligated to serve qualified tenants for the longest periods, and projects which are located in qualified census tracts and the devel-

opment of which contributes to a concerted community revitalization plan; and which provides a procedure that the agency (or an agent or other private contractor of such agency) will follow in monitoring for noncompliance with the provisions of §42 and in notifying the Internal Revenue Service of such noncompliance which such agency becomes aware of and in monitoring for noncompliance with habitability standards through regular site visits.

(B) As defined in §2306.6702, Texas Government Code: A plan adopted by the board that provides the threshold, scoring, and underwriting criteria based on housing priorities of the Department that are appropriate to local conditions; provides a procedure for the Department, the Department's agent, or another private contractor of the Department to use in monitoring compliance with the qualified allocation plan and this subchapter; and consistent with §2306.6710(e), gives preference in housing tax credit allocations to Developments that, as compared to the other Developments:

(i) when practicable and feasible based on documented, committed, and available third-party funding sources, serve the lowest-income tenants per housing tax credit; and

(ii) produce for the longest economically feasible period the greatest number of high quality units committed to remaining affordable to any tenants who are income-eligible under the low-income housing tax credit program.

(66) Qualified Basis--With respect to a building within a Development, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(67) Qualified Census Tract--Any census tract which is so designated by the Secretary of HUD in accordance with the Code, §42(d)(5)(C)(ii).

(68) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) is intended for, and solely occupied by, individuals 62 years of age or older; or

(B) is intended and operated for occupancy by at least one individual 55 years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one individual who is 55 years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals 55 years of age or older. (See 42 U.S.C. Section 3607(b)).

(69) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(70) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low-income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in one or more of the Set-Asides, including, but not limited to, the nonprofit Set-Aside, the At-Risk Development Set-Aside and the TX-USDA-RHS Allocation. (2306.6729)

(71) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization (directly or through a partnership or wholly-owned subsidiary) holds a controlling interest, materially participates (within the meaning of the Code, §469(h), as it may be amended from time to time) in its development and operation throughout the Compliance Period, and otherwise meets the requirements of the Code, §42(h)(5). (2306.6729)

(72) Reference Manual--That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Housing Tax Credit Program.

(73) Rehabilitation--The improvement or modification of an existing structure through alterations, incidental additions or enhancements. Rehabilitation includes repairs necessary to correct the results of deferred maintenance, the replacement of principal fixtures and components, improvements to increase the efficient use of energy, and installation of security devices. Rehabilitation may include demolition, reconstruction and adding rooms outside the existing walls of a structure, but adding a housing unit is considered New Construction.

(74) Related Party--As defined, (2306.6702)

(A) The following individuals or entities:

(i) the brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573, Texas Government Code;

(ii) a person and a corporation, if the person owns more than 50 percent of the outstanding stock of the corporation;

(iii) two or more corporations that are connected through stock ownership with a common parent possessing more than 50 percent of:

(I) the total combined voting power of all classes of stock of each of the corporations that can vote;

(II) the total value of shares of all classes of stock of each of the corporations; or

(III) the total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) a grantor and fiduciary of any trust;

(v) a fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) a fiduciary of a trust and a beneficiary of the trust;

(vii) a fiduciary of a trust and a corporation if more than 50 percent of the outstanding stock of the corporation is owned by or for:

(I) the trust; or

(II) a person who is a grantor of the trust;

(viii) a person or organization and an organization that is taxexempt under the Code, §501(a), and that is controlled by that person or the person's family members or by that organization;

(ix) a corporation and a partnership or joint venture if the same persons own more than:

(I) 50 percent of the outstanding stock of the corporation; and

(II) 50 percent of the capital interest or the profits' interest in the partnership or joint venture;

(x) an S corporation and another S corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

(xi) an S corporation and a C corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

(xii) a partnership and a person or organization owning more than 50 percent of the capital interest or the profits' interest in that partnership; or

(xiii) two partnerships, if the same person or organization owns more than 50 percent of the capital interests or profits' interests.

(B) Nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(75) Rules--The Department's Housing Tax Credit Program Qualified Allocation Plan and Rules as presented in this title.

(76) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 20,000 or less and does not share a boundary with an urban area; or

(C) in an area that is eligible for New Construction or Rehabilitation funding by TX-USDA-RHS. (2306.6702)

(77) Rural Development--A Development located within a Rural Area. A Rural Development may not exceed 76 Units if New Construction.

(78) Selection Criteria--Criteria used to determine housing priorities of the State under the Housing Tax Credit Program as specifically defined in §50.9(i) of this title.

(79) Set-Aside--A reservation of a portion of the available Housing Tax Credits under the State Housing Credit Ceiling to provide financial support for specific types of housing or geographic locations or serve specific types of Applications or Applicants as permitted by the Qualified Allocation Plan on a priority basis. (2306.6702)

(80) State Housing Credit Ceiling--The limitation on the aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3)(C).

(81) Student Eligibility--Per the Code, §42(i)(3)(D), A unit shall not fail to be treated as a low-income unit merely because it is occupied:

(A) by an individual who is:

(i) a student and receiving assistance under Title IV of the Social Security Act (42 U.S.C. §§601 et seq.), or

(ii) enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 USCS §§1501 et seq., generally; for full classification, consult USCS Tables volumes) or under other similar Federal, State, or local laws, or

(B) entirely by full-time students if such students are:

(i) single parents and their children and such parents and children are not dependents (as defined in section 152) of another individual, or

(ii) married and file a joint return.

(82) Tax-Exempt Bond Development--A Development requesting or having been awarded housing tax credits and which receives a portion of its financing from the proceeds of tax-exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(83) Third Party--A Third Party is a Person who is not an:

(A) Applicant, General Partner, Developer, or General Contractor, or

(B) an Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor, or

(C) Person(s) receiving any portion of the contractor fee or developer fee.

(84) Threshold Criteria--Criteria used to determine whether the Development satisfies the minimum level of acceptability for consideration as specifically defined in §50.9(h) of this title. (2306.6702)

(85) Total Housing Development Cost--The total of all costs incurred or to be incurred by the Development Owner in acquiring, constructing, rehabilitating and financing a Development, as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas. Costs associated with the sale or use of Housing Tax Credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment.

(86) TX-USDA-RHS--The Rural Housing Services (RHS) of the United States Department of Agriculture (USDA) serving the State of Texas (formerly known as TxFmHA) or its successor.

(87) Unit--Any residential rental unit in a Development consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation. (2306.6702) For purposes of completing the Rent Schedule for loft or studio type Units (which still must meet the definition of Bedroom), a Unit with 649 square feet or less is considered an efficiency unit, a Unit with 650 to 899 square feet is considered not more than a one-bedroom Unit, a Unit with 900 to 999 square feet is considered not more than a two-bedroom Unit, a Unit with 1000 to 1199 square feet is considered not more than a three-bedroom Unit, and a Unit with 1200 square feet or more is considered a four bedroom unit.

(88) Urban/Exurban Area--Non-Rural Areas located within the boundaries of a metropolitan Area as designated by the US Office of Management and Budget as of November 1, 2005, or for Tax-Exempt Bond Developments or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.), the date Volume III is submitted to the Department.

§50.4. State Housing Credit Ceiling.

The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C), using such information and guidance as may be made available by the Internal Revenue Service. The Department shall publish each such determination in the *Texas Register* within 30 days after the receipt of such information as is required for that purpose by the Internal Revenue Service.

The aggregate amount of commitments of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. As permitted by §42(h)(4), Housing Credit Allocations made to Tax-Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§50.5. Ineligibility; Disqualification and Debarment; Certain Applicant and Development Standards; Representation by Former Board Member or Other Person; Due Diligence, Sworn Affidavit; Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment.

(a) Ineligibility. An Application is ineligible if:

(1) The Applicant, Development Owner, Developer or Guarantor has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or, (2306.6721(c)(2))

(2) The Applicant, Development Owner, Developer or Guarantor has been convicted of a state or federal crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen years preceding the Application deadline; or,

(3) The Applicant, Development Owner, Developer or Guarantor at the time of Application is: subject to an enforcement or disciplinary action under state or federal securities law or by the NASD; is subject to a federal tax lien; or is the subject of an enforcement proceeding with any Governmental Entity; or

(4) The Applicant, Development Owner, Developer or Guarantor with any past due audits has not submitted those past due audits to the Department in a satisfactory format. A Person is not eligible to receive a commitment of Housing Tax Credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of June 1 of each year, or for Tax-Exempt Bond Developments or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than 30 days after Volume III of the application is submitted; or

(5) (2306.6703(a)(1)) At the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been:

(A) a member of the Board; or

(B) the Executive Director, a Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Portfolio Management and Compliance, the Director of Real Estate Analysis, or a manager over housing tax credits employed by the Department.

(6) (2306.6703(a)(2)) The Applicant proposes to replace in less than 15 years any private activity bond financing of the Development described by the Application, unless:

(A) the Applicant proposes to maintain for a period of 30 years or more 100 percent of the Development Units supported by Housing Tax Credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50 percent of the Area Median Gross Income, adjusted for family size; and

(B) at least one-third of all the units in the Development are public housing units or Section 8 Development-based units; or,

(7) The Development is located in a municipality or, if located outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the reservation is made by the Texas Bond Review Board) unless the Applicant: (2306.6703(a)(4))

(A) has obtained prior approval of the Development from the governing body of the appropriate municipality or county containing the Development; and

(B) has included in the Application a written statement of support from that governing body referencing this rule and authorizing an allocation of housing tax credits for the Development;

(C) For purposes of this paragraph, evidence under subparagraphs (A) and (B) of this paragraph must be received by the Department no later than April 1, 2006 (or for Tax-Exempt Bond Developments no later than 14 days before the Board meeting where the credits will be considered) and may not be more than one year old; or

(8) The Applicant proposes to construct a new Development that is located one linear mile (measured by a straight line on a map) or less from a Development that: (2306.6703(a)(3))

(A) serves the same type of household as the new Development, regardless of whether the Developments serve families, elderly individuals, or another type of household;

(B) has received an allocation of Housing Tax Credits (including Tax-Exempt Bond Developments) for New Construction at any time during the three-year period preceding the date the application round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Volume I is submitted); and

(C) has not been withdrawn or terminated from the Housing Tax Credit Program.

(D) An Application is not ineligible under this paragraph if:

(i) the Development is using federal HOPE VI funds received through the United States Department of Housing and Urban Development; locally approved funds received from a public improvement district or a tax increment financing district; funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. Section 12701 et seq.); or funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. Section 5301 et seq.); or

(ii) the Development is located in a county with a population of less than one million; or

(iii) the Development is located outside of a metropolitan statistical area; or

(iv) the local government where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under subparagraphs (A) - (C) of this paragraph. For purposes of this clause, evidence of the local government vote or evidence required by subparagraph (D) of this paragraph must be received by the Department no later than April 1, 2006 (or for Tax-Exempt Bond Developments no later than 14 days before the Board meeting where the credits will be committed) and may not be more than one year old.

(E) In determining the age of an existing development as it relates to the application of the three-year period, the development will be considered from the date the Board took action on approving the allocation of tax credits. In dealing with ties between two or more Developments as it relates to this rule, refer to §50.9(j).

(9) A submitted Application has an entire Volume of the application missing; has excessive omissions of documentation from the Threshold Criteria or Uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review can not reasonably be performed by the Department, as determined by the Department.

(b) Disqualification and Debarment. The Department will disqualify an Application, and/or debar a Person (see §2306.6721, Texas Government Code), if it is determined by the Department that any issues identified in the paragraphs of this subsection exist. The Department may debar a Person for one year from the date of debarment, or until the violation causing the debarment has been remedied, whichever term is longer, if the Department determines the facts warrant it. Causes for disqualification and debarment include: (2306.6721)

(1) The provision of fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresentation in the Application or other information submitted to the Department at any stage of the evaluation or approval process; or,

(2) The Applicant, Development Owner, Developer or Guarantor or anyone that has ownership interest in the Development Owner, Developer or Guarantor that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with the LURA (or any other document containing an Extended Housing Commitment) or the program rules in effect for such property as further described in §60.1 of this title on May 1, 2006 or for Tax-Exempt Bond Developments or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than 30 days after Volume III of the application is submitted; (2306.6721(c)(3)) or

(3) The Applicant, Development Owner, Developer or Guarantor or anyone that has ownership interest in the Development Owner, Developer or Guarantor that is active in the ownership or Control of one or more other rent restricted rental housing properties outside of the state of Texas has an incidence of Material Noncompliance with the LURA or the program rules in effect for such tax credit property as further described in §60.1 of this title on May 1, 2006 or for Tax-Exempt Bond Developments or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than 30 days after Volume III of the application is submitted; or

(4) The Applicant, Development Owner, Developer, or any Guarantor, or any Affiliate of such entity has been a Principal of any entity that failed to make all loan payments to the Department in accordance with the terms of the loan, as amended, or was otherwise in default with any provisions of any loans from the Department.

(5) The Applicant or the Development Owner that is active in the ownership or Control of one or more tax credit properties in the state of Texas has failed to pay in full any fees within 30 days of when they were billed by the Department, as further described in §50.20 of this title; or

(6) the Applicant or a Related Party and any Person who is active in the construction, Rehabilitation, ownership, or Control of the proposed Development, including a General Partner or contractor, and a Principal or Affiliate of a General Partner or contractor, or an individual employed as a lobbyist by the Applicant or a Related Party, communicates with any Board member during the period of time beginning on the date an Application is filed and ending on the date the Board makes a final decision with respect to any approval of that Application, unless the communication takes place at any board meeting or public hearing held with respect to that Application. Communication with Department staff must be in accordance with §50.9(b) of this title; violation of the communication restrictions of §50.9(b) is also a basis for disqualification and/or debarment. (2306.1113)

(7) It is determined by the Department's General Counsel that there is evidence that establishes probable cause to believe that an Applicant, Development Owner, Developer, or any of their employees or agents has violated a state revolving door or other standard of conduct or conflict of interest statute, including §2306.6733, Texas Government Code, or a section of Chapter 572, Texas Government Code, in making, advancing, or supporting the Application.

(8) Applicants may be ineligible as further described in §50.17(d)(8) of this title.

(9) The Applicant or a Related Party has failed to comply in the past with, or materially violates, any condition imposed by the Department in connection with the allocation of Housing Tax Credits, or has repeatedly violated a LURA. (2306.6721(b), (c)(1) and (c)(3).

(c) Certain Applicant and Development Standards. Notwithstanding any other provision of this section, the Department may not allocate tax credits to a Development proposed by an Applicant if the Department determines that: (2306.223)

(1) the Development is not necessary to provide needed decent, safe, and sanitary housing at rental prices that individuals or families of low and very low-income or families of moderate income can afford;

(2) the Development Owner undertaking the proposed Development will not supply well-planned and well-designed housing for individuals or families of low and very low-income or families of moderate income;

(3) the Development Owner is not financially responsible;

(4) the Development Owner has contracted, or will contract for the proposed Development with, a Developer that:

(A) is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) has breached a contract with a public agency and failed to cure that breach; or

(C) misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency and the amount of financial assistance awarded to the Developer by the agency;

(5) the financing of the housing Development is not a public purpose and will not provide a public benefit; and

(6) the Development will be undertaken outside the authority granted by this chapter to the Department and the Development Owner.

(d) Representation by Former Board Member or Other Person. (2306.6733)

(1) A former Board member or a former executive director, deputy executive director, director of multifamily finance production, director of portfolio management and compliance, director of real estate analysis or manager over housing tax credits previously employed by the Department may not:

(A) for compensation, represent an Applicant or one of its Related Parties for an allocation of tax credits before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceased;

(B) represent any Applicant or a Related Party of an Applicant or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceased.

(2) A Person commits a criminal offense if the Person violates section 2306.6733. An offense under this section is a Class A misdemeanor.

(e) Due Diligence, Sworn Affidavit. In exercising due diligence in considering information of possible ineligibility, possible grounds for disqualification and debarment, Applicant and Development standards, possible improper representation or compensation, or similar matters, the Department may request a sworn affidavit or affidavits from the Applicant, Development Owner, Developer, Guarantor, or other persons addressing the matter. If an affidavit determined to be sufficient by the Department is not received by the Department within seven business days of the date of the request by the Department, the Department may terminate the Application.

(f) Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment. An Applicant or Person found ineligible, disqualified, debarred or otherwise terminated under subsections (a) - (e) of this section will be notified in accordance with the Administrative Deficiency process described in §50.9(d)(4) of this title. They may also utilize the appeals process described in §50.17(b) of this title. (2306.6721(d))

§50.6. Site and Development Restrictions: Floodplain; Ineligible Building Types; Scattered Site Limitations; Credit Amount; Limitations on the Size of Developments; Limitations no Rehabilitation Costs; Unacceptable Sites; Appeals and Administrative Deficiencies for Site and Development Restrictions.

(a) Floodplain. Any Development proposing New Construction located within the 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the 100 year floodplain. No buildings or roads that are part of a Development proposing Rehabilitation, with the exception of developments with federal funding assistance from HUD or TX USDA-RHS, will be permitted in the 100 year floodplain unless they already meet the requirements established in this subsection for New Construction.

(b) Ineligible Building Types. Applications involving Ineligible Building Types as defined in §50.3(49) of this title will not be considered for allocation of tax credits.

(c) Scattered Site Limitations. Consistent with §50.3(30) of this title, a Development must be financed under a common plan, be owned by the same Person for federal tax purposes, and the buildings may be either located on a single site or contiguous site, or be located on scattered sites and contain only rent-restricted units.

(d) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the affordability period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department, or that the Development will qualify for and be able to claim Housing Tax Credits. The Department will limit the allocation of tax credits to no more than $1.2 million per Development. The Department shall not allocate more than $2 million of tax credits in any given Application Round to any Applicant, Developer, Related Party or Guarantor; Housing Tax Credits approved by the Board during the 2006 calendar year, including commitments from the 2006 Credit Ceiling and forward commitments from the 2007 Credit Ceiling, are applied to the credit cap limitation for the 2006 Application Round. In order to encourage the capacity enhancement of developers in rural areas, the Department will prorate the credit amount allocated in situations where an Application is submitted in the Rural Regional Allocation and the Development has 76 Units or less. To be considered for this provision, a copy of a Joint Venture Agreement and narrative on how this builds the capacity of the inexperienced developers is required. Tax-Exempt Bond Development Applications are not subject to these Housing Tax Credit limitations, and Tax-Exempt Bond Developments will not count towards the total limit on tax credits per Applicant. The limitation does not apply (2306.6711(b)):

(1) to an entity which raises or provides equity for one or more Developments, solely with respect to its actions in raising or providing equity for such Developments (including syndication related activities as agent on behalf of investors);

(2) to the provision by an entity of "qualified commercial financing" within the meaning of the Code (without regard to the 80% limitation thereof);

(3) to a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Development by such organization consists only of the provision of loan funds, grants or social services; and

(4) to a Development Consultant with respect to the provision of consulting services, provided the Development Consultant fee received for such services does not exceed 10% of the fee to be paid to the Developer (or 20% for Qualified Nonprofit Developments), or $150,000, whichever is greater.

(e) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units if the Development involves Housing Tax Credits. The minimum Development size will be 4 Units if the funding source only involves the Housing Trust Fund or HOME Program.

(2) Rural Developments involving New Construction will be limited to 76 Units. Rural Developments involving only Rehabilitation do not have a size limitation.

(3) Developments involving New Construction, that are not Tax-Exempt Bond Developments, will be limited to 252 Total Units, wherein the maximum Department administered Units will be limited to 200 Units. Tax-Exempt Bond Developments will be limited to 252 Total Units. These maximum Unit limitations also apply to those Developments which involve a combination of Rehabilitation and New Construction. Developments that consist solely of acquisition/Rehabilitation or Rehabilitation only may exceed the maximum Unit restrictions. For those Developments which are a second phase or are otherwise adjacent to an existing tax credit Development unless

such proposed Development is being constructed to provide replacement of previously existing affordable multifamily units on its site (in a number not to exceed the original units being replaced) or that were originally located within a one mile radius from the proposed Development, the combined Unit total for the Developments may not exceed the maximum allowable Development size, unless the first phase has been completed and has attained Sustaining Occupancy (as defined in §1.31 of this title) for at least six months.

(f) Limitations on the Location of Developments. Staff will only recommend, and the Board may only allocate, housing tax credits from the Credit Ceiling to more than one Development in the same calendar year if the Developments are, or will be, located more than one linear mile apart as determined by the Department. If the Board forward commits credits from the following year's allocation of credits, the Development is considered to be in the calendar year in which the Board votes, not in the year of the Credit Ceiling. This limitation applies only to communities contained within counties with populations exceeding one million (which for calendar year 2006 are Harris, Dallas, Tarrant and Bexar Counties). For purposes of this rule, any two sites not more than one linear mile apart are deemed to be "in a single community." (2306.6711) This restriction does not apply to the allocation of housing tax credits to Developments financed through the Tax-Exempt Bond program, including the Tax-Exempt Bond Developments under review and existing Tax-Exempt Bond Developments in the Department's portfolio. (2306.67021)

(g) Rehabilitation Costs. Rehabilitation Developments must establish that the Rehabilitation will substantially improve the condition of the housing and will involve at least $12,000 per Unit in direct hard costs unless financed with TX-USDA-RHS in which case the minimum is $6,000.

(h) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department.

(i) Appeals and Administrative Deficiencies for Site and Development Restrictions. An Application or Development found to be in violation under subsections (a) - (h) of this section will be notified in accordance with the Administrative Deficiency process described in §50.9(d)(4) of this title. They may also utilize the appeals process described in §50.17(b) of this title.

§50.7. Regional Allocation Formula; Set-Asides; Redistribution of Credits.

(a) Regional Allocation Formula. As required by §2306.111(d), Texas Government Code, the Department uses a regional distribution formula developed by the Department to distribute credits from the State Housing Credit Ceiling to all urban/exurban areas and rural areas. The formula is based on the need for housing assistance, and the availability of housing resources in those urban/exurban areas and rural areas, and the Department uses the information contained in the Department's annual state low income housing plan and other appropriate data to develop the formula. This formula establishes separate targeted tax credit amounts for rural areas and urban/exurban areas within each of the Uniform State Service Regions. Each Uniform State Service Region's targeted tax credit amount will be published on the Department's web site. The regional allocation for rural areas is referred to as the Rural Regional Allocation and the regional allocation for urban/exurban areas is referred to as the Urban/Exurban Regional Allocation. Developments qualifying for the Rural Regional Allocation must meet the Rural Development definition. At least 5% of each region's allocation for each calendar year shall be allocated to Developments which are financed through TX-USDA-RHS, that meet the definition of a Rural Development, do not exceed 76 Units if New Construction, and have filed an "Intent to Request 2006 Housing Tax Credits" form by the Pre-Application submission deadline. These Developments will be attributed to the Rural Regional Allocation in each region where they are located. Developments financed through TX-USDA-RHS's 538 Guaranteed Rural Rental Housing Program will not be considered under this set-aside. Commitments of 2006 Housing Tax Credits issued by the Board in 2005 will be applied to each Set-Aside, Rural Regional Allocation, Urban/Exurban Regional Allocation and TX-USDA-RHS Allocation for the 2006 Application Round as appropriate.

(b) Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies: (2306.111(d))

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have the Controlling interest in the Qualified Nonprofit Development applying for this Set-Aside. If the organization's Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the controlling managing General Partner. If the organization's Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit set-aside must have the nonprofit entity or its nonprofit affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement. (2306.6729 and 2306.6706(b))

(2) At least 15% of the allocation to each Uniform State Service Region will be set aside for allocation under the At-Risk Development Set-Aside. Through this Set-Aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments designated as At-Risk Developments as defined in §50.3(13) of this title. (2306.6714). To qualify as an At-Risk Development, the Applicant must provide evidence that it either is not eligible to renew, retain or preserve any portion of the financial benefit described in §50.3(13)(A) of this title, or provide evidence that it will renew, retain or preserve the financial benefit described in §50.3(13)(A) of this title; and must have filed an "Intent to Request 2006 Housing Tax Credits" form by the Pre-Application submission deadline.

(c) Redistribution of Credits. (2306.111(d)) If any amount of housing tax credits remain after the initial commitment of housing tax credits among the Rural Regional Allocation and Urban/Exurban Regional Allocation within each Uniform State Service Region and among the Set-Asides, the Department may redistribute the credits amongst the different regions and Set-Asides depending on the quality of Applications submitted as evaluated under the factors described in §50.9(d) of this title, the need to most closely achieve regional allocation goals and then the level of demand exhibited in the Uniform State Service Regions during the Allocation Round. However as described in subsection (b)(1) of this section, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a Uniform State Service Region which does not have enough qualified Applications to meet its regional credit distribution amount, then those credits will be apportioned to the other Uniform State Service Regions.

§50.8. Pre-Application: Submission; Communication with Departments Staff; Evaluation Process; Threshold Criteria and Review; Results. (2306.6704)

(a) Pre-Application Submission. Any Applicant requesting a Housing Credit Allocation may submit a Pre-Application to the Department during the Pre-Application Acceptance Period along with the required Pre-Application Fee as described in §50.20 of this title. Only

one Pre-Application may be submitted by an Applicant for each site under the State Housing Credit Ceiling. The Pre-Application submission is a voluntary process. While the Pre-Application Acceptance Period is open, Applicants may withdraw their Pre-Application and subsequently file a new Pre-Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized to request the Applicant to provide additional information it deems relevant to clarify information contained in the Pre-Application or to submit documentation for items it considers to be Administrative Deficiencies. The rejection of a Pre-Application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(b) Communication with the Department. Applicants that submit a Pre-Application are restricted from communication with Department staff as provided in §50.9(b) of this title. (2306.1113)

(c) Pre-Application Evaluation Process. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria. A TX-USDA-RHS 515 Development (only for Rehabilitation) will receive the Pre-Application points further outlined in §50.9(i) of this title upon submission to the Department of an executed TX-USDA-RHS letter indication TX-USDA-RHS has received a Consent Request, also referred to as a preliminary Submittal, as described in 7 CFR 3560.406. Applications involving New Construction that are associated with a TX-USDA-RHS Development are not exempt from Pre-Application and are eligible to compete for the Pre-Application points further outlined in §50.9(i) of this title. An Application that has not received confirmation from the state office of RHS of its financing from TX-USDA-RHS may qualify for Pre-Application points, but such points shall be withdrawn upon the Development's receipt of TX-USDA-RHS financing. Pre-Applications that are found to have Administrative Deficiencies will be handled in accordance with §50.9(d)(4) of this title. Department review at this stage is limited and not all issues of eligibility and threshold are reviewed at Pre-Application. Acceptance by staff of a Pre-Application does not ensure that an Applicant satisfies all Application eligibility, Threshold or documentation requirements. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or threshold deficiencies at the time of Pre-Application.

(d) Pre-Application Threshold Criteria and Review. Applicants submitting a Pre-Application will be required to submit information demonstrating their satisfaction of the Pre-Application Threshold Criteria. The Pre-Applications not meeting the Pre-Application Threshold Criteria will be terminated and the Applicant will receive a written notice to the effect that the Pre-Application Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Pre-Application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-Application Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. The Pre-Application Threshold Criteria include:

(1) Submission of a "Pre-Application Submission Form" and "Certification of Pre-Application Itemized Self-Score" and

(2) Evidence of property control through March 1, 2006 as evidenced by the documentation required under §50.9(h)(7)(A) of this title.

(3) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. Notifications under subparagraph (B)(i) of this paragraph must be made by the deadlines described in that clause; notifications under subparagraphs (B)(ii) - (ix) of this paragraph must be made prior to the close of the Pre-Application Acceptance Period. (2306.6704) Evidence of notification must meet the requirements identified in subparagraph (A) of this paragraph to all of the individuals and entities identified in subparagraph (B) of this paragraph. Evidence of such notifications shall include a certification in the format provided by the Department that the Applicant made the notifications to all required individuals and entities in the format provided by the Department on or before the deadlines. (2306.6704)

(A) Each such notice must include, at a minimum, all of the following:

(i) The Applicant's name, address, individual contact name and phone number;

(ii) The Development name, address, city and county;

(iii) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(iv) Statement of whether the Development proposes New Construction or Rehabilitation;

(v) The type of Development being proposed (single family homes, duplex, apartments, townhomes, highrise etc.) and population being served (family, Intergenerational Housing, or elderly);

(vi) The approximate total number of Units and approximate total number of low-income Units;

(vii) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the percentage of Units that are market rate;

(viii) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Pre-Application, which are subject to change as annual changes in the area median income occur; and

(ix) The expected completion date if credits are awarded.

(B) Notification must be sent to all of the following individuals and entities. Officials to be notified are those officials in office at the time the Pre-Application is submitted.

(i) Neighborhood Organizations on record with the state or county. Applicants must provide evidence that neighborhood organizations were notified pursuant to this subsection. Evidence in the form of a certification must be provided that a letter requesting information on neighborhood organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site and meeting the requirements of "Neighborhood Organization Request" as outlined in the Application was sent no later than December 20, 2005 to the local elected official for the city or if located outside of a city, then the county where the Development is proposed to be located. If the Development is located in a jurisdiction that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located in a jurisdiction that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. For urban/exurban areas, entities identified in the letter from the local elected official whose boundaries include the proposed Development and whose listed address has the same zip code as the zip code for the Development must be provided with written notification. If any other zip codes exist within a half mile

of the Development site, then all entities identified in the letters with those adjacent zip codes must also be provided with written notification. For rural areas, all entities identified in the letters whose listed address is within a half mile of the Development site must be provided with written notification. If the Applicant can certify that there are no neighborhood organizations on any list from the local elected officials which are required to be notified pursuant to this subsection, then such certification in lieu of notification may be acceptable. If no reply letter is received from the local elected officials by January 1, 2006, (or For Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., by 7 days prior to the submission of the Application) then the Applicant must submit a statement attesting to that fact. If an Applicant has knowledge of any neighborhood organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site, the Applicant must notify those organizations. In the event that local elected officials refer the Applicant to another source, the Applicant must request neighborhood organizations from that source in the same format. If the Applicant has no knowledge of neighborhood organizations within whose boundaries the Development is proposed to be located, the Applicant must attest to that fact in the format provided by the Department as part of the Application.

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of any municipality containing the Development;

(v) All elected members of the governing body of any municipality containing the Development;

(vi) Presiding officer of the governing body of the county containing the Development;

(vii) All elected members of the governing body of the county containing the Development;

(viii) State senator of the district containing the Development; and

(ix) State representative of the district containing the Development.

(e) Pre-Application Results. Only Pre-Applications which have satisfied all of the Pre-Application Threshold Criteria requirements set forth in subsection (d) of this section and §50.9(i)(12) of this title, will be eligible for Pre-Application points. The order and scores of those Developments released on the Pre-Application Submission Log do not represent a commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-Application Submission Log. Inclusion of a Development on the Pre-Application Submission Log does not ensure that an Applicant will receive points for a Pre-Application.

§50.9. Application: Submission; Communication with Department Employees; Adherence to Obligations; Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling; Evaluation Process for Tax-Exempt Bond Development Applications; Evaluation Process for Rural Rescue Applications Under the 2007 Credit Ceiling; Experience Pre-Certification Procedures; Threshold Criteria; Selection Criteria; Tiebreaker Factors; Staff Recommendations.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application, and the required Application fee as described in §50.20 of this title, to the Department during the Application Acceptance Period. Only complete Applications will be accepted. All required volumes must be appropriately bound as required by the Application Submission Procedures Manual and fully complete for submission and received by the Department not later than 5:00 p.m. on the date the Application is due. Only one Application may be submitted for a site in an Application Round. While the Application Acceptance Period is open, Applicants may withdraw their Application and subsequently file a new Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized, but not required, to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency, including ineligibility criteria, site and development restrictions, and threshold and selection criteria documentation. (2306.6708) An Applicant may not change or supplement an Application in any manner after the filing deadline, and may not add any set-asides, increase their credit amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from the Department to remedy an Administrative Deficiency as further described in §50.3(1) of this title or by amendment of an Application after a commitment or allocation of tax credits as further described in §50.17(d) of this title.

(b) Communication with Department Employees. Communication with Department staff by Applicants that submit a Pre-Application or Application must follow the following requirements. During the period beginning on the date a Development Pre-Application or Application is filed and ending on the date the Board makes a final decision with respect to any approval of that Application, the Applicant or a Related Party, and any Person that is active in the construction, rehabilitation, ownership or Control of the proposed Development including a General Partner or contractor and a Principal or Affiliate of a General Partner or contractor, or individual employed as a lobbyist by the Applicant or a Related Party, may communicate with an employee of the Department about the Application orally or in written form, which includes electronic communications through the Internet, so long as that communication satisfies the conditions established under paragraphs (1) - (3) of this subsection. Section 50.5(b)(6) of this title applies to all communication with Board members. Communications with Department employees is unrestricted during any board meeting or public hearing held with respect to that Application.

(1) The communication must be restricted to technical or administrative matters directly affecting the Application;

(2) The communication must occur or be received on the premises of the Department during established business hours;

(3) a record of the communication must be maintained by the Department and included with the Application for purposes of board review and must contain the date, time, and means of communication; the names and position titles of the persons involved in the communication and, if applicable, the person's relationship to the Applicant; the subject matter of the communication; and a summary of any action taken as a result of the communication. (2306.1113)

(c) Adherence to Obligations. (2306.6720, General Appropriation Act, Article VII, Rider 8(a)) All representations, undertakings and commitments made by an Applicant in the application process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such Development, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or oper-

ation of the Development, shall be enforceable even if not reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform, as stated in the representations and in accordance with the LURA. Effective December 1, 2006 (meaning this does not apply to amendments received prior to this effective date and does not apply to 2006 Tax Credit Applications), if a Development Owner does not produce the Development as represented in the Application and in any amendments approved by the Department subsequent to the Application, or does not provide the necessary evidence for points received for the Commitment of Development Funding by Local Political Subdivisions by the required deadline (unless granted an extension by the Department):

(1) the Development Owner must provide a plan to the Department, for approval and subsequent implementation, that incorporates additional amenities to compensate for the non-conforming components; and

(2) the Board will opt either to terminate the Application and rescind the Commitment Notice, Determination Notice or Carryover Allocation Agreement as applicable or the Department must:

(A) Reduce the score by ten points for applications for tax credits that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development by ten points for the two Application Rounds concurrent to, or following, the date that the non-conforming aspect, or lack of financing, was identified by the Department; and

(B) prohibit eligibility to apply for tax credits for a Tax-Exempt Bond Development that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development for 12 months from the date that the non-conforming aspect, or lack of financing, was identified by the Department.

(d) Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling. Applications submitted for competitive consideration under the State Housing Credit Ceiling will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5; Applicants will be promptly notified in these instances.

(1) Eligibility and Selection Criteria Review. All Applications will first be reviewed as described in this paragraph. Applications will be confirmed for eligibility under §50.5 of this chapter and Set-Aside eligibility will be confirmed. Then, each Application will be preliminarily scored according to the Selection Criteria listed in subsection (i) of this section. When a particular scoring criterion involves multiple points, the Department will award points to the proportionate degree, in its determination, to which a proposed Development complied with that criterion. As necessary to complete this process only, Administrative Deficiencies may be issued to the Applicant. This process will generate a preliminary Department score for every application.

(2) Priority Review Assessment. Each Application will be assessed based on either the Applicant's self-score or the Department's preliminary score, region, and any Set-Asides that the Application indicates it is eligible for, consistent with paragraph (5) of this subsection. Those Applications that appear to be most competitive will be designated as "priority" Applications. Applications that do not appear to be competitive may not be reviewed in detail for Threshold Criteria during the Application Round.

(3) Threshold Criteria Review. Applications that are designated as "priority" from the Priority Review Assessment will be evaluated in detail for eligibility under §50.6 of this chapter and against the Threshold Criteria. Applications not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in which event the Applicant is given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria. To the extent that the review of Threshold Criteria documentation, or submission of Administrative Deficiency documentation, alters the score assigned to the Application, Applicants will be notified of their final score. As Applications are evaluated under this Review process, a final score by the Department may remove the Application from "priority" status at which point other Applications may be designated as "priority" and reviewed under this paragraph.

(4) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility and Selection, and Threshold Criteria may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of a facsimile, email (if an email address is provided by the Applicant) and a telephone call to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. If Administrative Deficiencies are not clarified or corrected to the satisfaction of the Department within five business days of the deficiency notice date, then for competitive Applications under the State Housing Credit Ceiling five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains unresolved. If deficiencies are not clarified or corrected within seven business days from the deficiency notice date, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period.

(5) Subsequent Evaluation of Prioritized Applications and Methodology for Award Recommendations to the Board. The Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division - in general these will be those applications identified as "priority". This prioritization order will also be used in making recommendations to the Board. Assignments will be determined by first selecting the Applications with the highest scores in the At-Risk Set-Aside and TX-USDA-RHS Allocation within each Uniform State Service Region until the minimum requirements stated in §50.7(b) are attained. Remaining funds within each Uniform State Service Region will then be selected based on the highest scoring Developments, regardless of Set-Aside, in accordance with the requirements under §50.7(a) of this title for a Rural Regional Allocation and Urban/Exurban Regional Allocation. After this priority review has occurred, staff will review priority applications to ensure that at least 10% of the priority applications are qualified Nonprofits to satisfy the Nonprofit Set-Aside. If 10% is not met, then the Department will add the highest Qualified Nonprofits statewide until the 10% Nonprofit Set-Aside is met. Selection for each of the Set-Asides will take precedence over selection for the Rural Regional Allocation and Urban/Exurban Regional Allocation. Funds for the Rural Regional Allocation or Urban/Exurban Regional Allocation

within a region, for which there are no eligible feasible applications, will be redistributed as provided in §50.7(c) of this title, Redistribution of Credits. If the Department determines that an allocation recommendation would cause a violation of the $2 million limit described in §50.6(d) of this title, the Department will make its recommendation by selecting the Development(s) that most effectively satisfies(y) the Department's goals in meeting set-aside and regional allocation goals. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available housing tax credits according to regional allocation goals and Set-Aside categories. To enable the Board to establish a Waiting List, the Department shall underwrite as many additional Applications as necessary to ensure that all available housing tax credits are allocated within the period required by law. (2306.6710(a), (b) and (d); 2306.111)

(6) Underwriting Evaluation and Criteria. The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of housing tax credits. In determining an appropriate level of housing tax credits, the Department shall, at a minimum, evaluate the cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for the county in which the Development is to be located; if certifications are unavailable for the county, then the metropolitan statistical area in which the Development is to be located; or if certifications are unavailable under the county or the metropolitan statistical area, then the Uniform State Service Region in which the Development is to be located. Underwriting of a Development will include a determination by the Department, pursuant to the Code, §42, that the amount of credits recommended for commitment to a Development is necessary for the financial feasibility of the Development and its long-term viability as a qualified rent restricted housing property. In making this determination, the Department will use the Underwriting Rules and Guidelines, §1.32 of this title. Receipt of feasibility points under §50.9(i)(1) of this title does not ensure that an Application will be considered feasible during the feasibility evaluation by the Real Estate Analysis Division and conversely, a Development may be found feasible during the feasibility evaluation by the Real Estate Analysis Division even if it did not receive points under §50.9(i)(1) of this title. (2306.6711(b); 2306.6710(d))

(A) The Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(B) The Department will reduce the Applicant's estimate of Developer's and/or Contractor fees in instances where these exceed the fee limits determined by the Department. In the instance where the Contractor is an Affiliate of the Development Owner and both parties are claiming fees, Contractor's overhead, profit, and general requirements, the Department shall be authorized to reduce the total fees estimated to a level that it determines to be reasonable under the circumstances. Further, the Department shall deny or reduce the amount of Housing Tax Credits allocated with respect to any portion of costs which it deems excessive or unreasonable. Excessive or unreasonable costs may include developer fee attributable to Related Party acquisition costs. The Department also may require bids or Third Party estimates in support of the costs proposed by any Applicant.

(7) Compliance Evaluation. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division, in accordance with Chapter 60 of this title.

(8) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns. Such inspection will evaluate the site based upon the criteria set forth in the Site Evaluation form provided in the Application and the inspector shall provide a written report of such site evaluation. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's appearance to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites include, without limitation, those containing a non-mitigable environmental factor that may adversely affect the health and safety of the residents. For Developments applying under the TX-USDA-RHS Set-Aside, the Department may rely on the physical site inspection performed by TX-USDA-RHS.

(e) Evaluation Process for Tax-Exempt Bond Development Applications. Applications submitted for consideration as Tax-Exempt Bond Developments will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5; Applicants will be promptly notified in these instances.

(1) Eligibility and Threshold Criteria Review. All Tax-Exempt Bond Development Applications will first be reviewed as described in this paragraph. Tax-Exempt Bond Development Applications will be confirmed for eligibility under §50.5 and §50.6 of this chapter and Applications will be evaluated in detail against the Threshold Criteria. Tax-Exempt Bond Development Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in which event the Applicant is given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria.

(2) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies as further described in subsection (d)(4) of this section.

(3) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Tax-Exempt Bond Development Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of housing tax credits as further described in subsection (d)(6) of this section. Tax-Exempt Bond Development Applications will also be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60 of this title.

(4) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(f) Evaluation Process for Rural Rescue Applications Under the 2007 Credit Ceiling. Applications submitted for consideration as Rural Rescue Applications pursuant to §50.10(c) of this title under the 2007 Credit Ceiling will be reviewed according to the process outlined in this subsection. A Rural Rescue Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Eligibility and Threshold Criteria Review. All Rural Rescue Applications will first be reviewed as described in this paragraph. Rural Rescue Applications will be confirmed for eligibility under §50.5 and §50.6 of this chapter, Set-Aside and Rural Rescue eligibility will be confirmed, and Applications will be evaluated in detail against the Threshold Criteria. Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in which event the Applicant is given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria.

(2) Selection Criteria Review. All Rural Rescue Applications will be evaluated against the Selection Criteria and a score will be assigned to the Application. The minimum score for Selection Criteria is not required to be achieved to be eligible.

(3) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies as further described in subsection (d)(4) of this section.

(4) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Tax-Exempt Bond Development Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of housing tax credits as further described in subsection (d)(6) of this section. Tax-Exempt Bond Development Applications will also be reviewed for evaluation of the previous participation by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60 of this title.

(5) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(g) Experience Pre-Certification Procedures. No later than 14 days prior to the close of the Application Acceptance Period, an Applicant must submit the documents required in this subsection to obtain the required pre-certification. For Applications submitted for Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) all of the documents in this section must be submitted with the Application. Upon receipt of the evidence required under this section, a certification from the Department will be provided to the Applicant for inclusion in their Application(s). Evidence must show that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units (single family or multifamily) in the capacity of owner, General Partner or Developer. If a Public Housing Authority organized an entity for the purpose of developing residential units the Public Housing Authority shall be considered a principal for the purpose of this requirement. If the individual requesting the certification was not the Development Owner, General Partner or Developer, but was the individual within one of those entities doing the work associated with the development of the units, the individual must show that the units were successfully developed as required below, and also provide written confirmation from the entity involved stating that the individual was the person responsible for the development. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $6,000 of direct hard cost per unit.

(1) The term "successfully" is defined as acting in a capacity as the owner, General Partner, or Developer of:

(A) at least 100 residential units or 80 percent of the total number of Units the applicant is applying to build (e.g. you must have 40 units successfully built to apply for 50 Units); or

(B) at least 36 residential units if the Development applying for credits is a Rural Development; or

(C) at least 25 residential units if the Development applying for credits has 36 or fewer total Units.

(2) One of the following documents must be submitted: American Institute of Architects (AIA) Document A111 - Standard Form of Agreement Between Owner & Contractor, AIA Document G704 - Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other documentation satisfactory to the Department verifying that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(A) that the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion);

(B) that the names on the forms and agreements tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application; and

(C) the number of units completed or substantially completed.

(h) Threshold Criteria. The following Threshold Criteria listed in this subsection are mandatory requirements at the time of Application submission unless specifically indicated otherwise:

(1) Completion and submission of the Application, which includes the entire Uniform Application and any other supplemental forms which may be required by the Department. (2306.1111)

(2) Completion and submission of the Site Packet as provided in the Application.

(3) Set-Aside Eligibility. Documentation must be provided that confirms eligibility for all Set-Asides under which the Application is seeking funding as required in the Application.

(4) Certifications. The "Certification Form" provided in the Application confirming the following items:

(A) A certification of the basic amenities selected for the Development. All Developments, must meet at least the minimum threshold of points. These points are not associated with the selection criteria points in subsection (i) of this section. The amenities selected must be made available for the benefit of all tenants. If fees in addition to rent are charged for amenities reserved for an individual tenant's use, then the amenity may not be included among those provided to satisfy this requirement. Developments must provide a minimum number of common amenities in relation to the Development size being proposed. The amenities selected must be selected from clause (ii) of this subparagraph and made available for the benefit of all tenants. Developments proposing Rehabilitation or proposing Single Room Occupancy will receive double points for each item. Applications for scattered site housing, including New Construction, Rehabilitation, and single-family design, will have the threshold test applied based on the number of Units per individual site. Any future changes in these amenities, or substitution of these amenities, must be approved by the Department in accordance with §50.17(d) of this title and may result in a decrease in awarded credits if the substitution or change includes a decrease in cost, or in the cancellation of a Commitment Notice or Carryover Allocation if all of the Common Amenities claimed are no longer met.

(i) Applications must meet a minimum threshold of points (based on the total number of Units in the Development) as follows:

(I) Total Units are less than 13, 0 points are required to meet Threshold for Rehabilitation and 1 point is required for New Construction;

(II) Total Units are between 13 and 24, 1 point is required to meet Threshold;

(III) Total Units are between 25 and 40, 3 points are required to meet Threshold;

(IV) Total Units are between 41 and 76, 6 points are required to meet Threshold;

(V) Total Units are between 77 and 99, 9 points are required to meet Threshold;

(VI) Total Units are between 100 and 149, 12 points are required to meet Threshold;

(VII) Total Units are between 150 and 199, 15 points are required to meet Threshold;

(VIII) Total Units are 200 or more, 18 points are required to meet Threshold.

(ii) Amenities for selection include those items listed in subclauses (I) - (XXIV) of this clause. Both Developments designed for families and Qualified Elderly Developments can earn points for providing each identified amenity unless the item is specifically restricted to one type of Development. All amenities must meet accessibility standards as further described in §50.9(h)(4)(D) and (F) of this title. An Application can only count an amenity once, therefore combined functions (a library which is part of a community room) only count under one category. Spaces for activities must be sized appropriately to serve the anticipated population.

(I) Full perimeter fencing (2 points);

(II) Controlled gate access (1 point);

(III) Gazebo w/sitting area (1 point);

(IV) Accessible walking path (1 point);

(V) Community gardens (1 point);

(VI) Community laundry room (1 point);

(VII) Public telephone(s) available to tenants 24 hours a day (2 points);

(VIII) Barbecue grills and picnic tables--at least one for every 50 Units (1 point);

(IX) Covered pavilion that includes barbecue grills and tables (2 points);

(X) Swimming pool (3 points);

(XI) Furnished fitness center (2 points);

(XII) Equipped Business Center (computer and fax machine) or Equipped Computer Learning Center (2 points);

(XIII) Furnished Community room (1 point);

(XIV) Library (separate from the community room) (1 point);

(XV) Enclosed sun porch or covered community porch/patio (2 points);

(XVI) Service coordinator office in addition to leasing offices (1 point);

(XVII) Senior Activity Room (Arts and Crafts, etc.)--Only Qualified Elderly Developments Eligible (2 points);

(XVIII) Health Screening Room (1 point);

(XIX) Secured Entry (elevator buildings only)--(1 point);

(XX) Horseshoe, Lawn Bowling Courts, Croquet Courts, Bocce Ball Courts, Putting Green or Shuffleboard Court--Only Qualified Elderly Developments Eligible (1 point);

(XXI) Community Dining Room w/full or warming kitchen--Only Qualified Elderly Developments Eligible (3 points);

(XXII) Two Children's Playgrounds Equipped for 5 to 12 year olds, two Tot Lots, or one of each--Only Family Developments Eligible (2 points) or one point for one playground or one tot lot;

(XXIII) Sport Court (Tennis, Basketball or Volleyball)--Only Family Developments Eligible (2 points); or

(XXIV) Furnished and staffed Children's Activity Center--Only Family Developments Eligible (3 points).

(B) A certification that the Development will have all of the following Unit Amenities (not required for Single Room Occupancy Developments). If fees in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy this requirement. Any future changes in these amenities, or substitution of these amenities, may result in a decrease in awarded credits if the substitution or change includes a decrease in cost or in a cancellation of a Commitment Notice or Carryover Allocation if the Threshold Criteria are no longer met.

(i) All New Construction Units must be built with three networks: One network installed for phone using CAT5e or better wiring; a second network for data installed using CAT5e or better wiring; and a third network for TV services using COAX cable;

(ii) Mini blinds or window coverings for all windows;

(iii) Dishwasher and Disposal (not required for TX-USDA-RHS Developments);

(iv) Refrigerator;

(v) Oven/Range;

(vi) Exhaust/vent fans in bathrooms; and

(vii) Ceiling fans in living areas and bedrooms.

(C) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or if no local building codes are in place then to the most recent version of the International Building Code.

(D) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 3601 et seq.), and the Fair Housing Amendments Act of 1988 (42 U.S.C. Section 3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. Section 2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. Section 701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, the Code Requirements for Housing Accessibility 2000 (or as amended from time to time) produced by the International Code Council and the Texas Accessibility Standards. (2306.257; 2306.6705(7))

(E) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit a report at least once in each 90-day period following the date of the Commitment Notice until the Cost Certification is submitted, in a format prescribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses. (2306.6734)

(F) Pursuant to §2306.6722, any Development supported with a housing tax credit allocation shall comply with the accessibility standards that are required under Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), and specified under 24 C.F.R. Part 8, Subpart C. The Applicant must provide a certification from an accredited architect or Department-approved third party accessibility specialist, that the Development will comply with the accessibility standards that are required under Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), and specified under 24 C.F.R. Part 8, Subpart C and this subparagraph. This includes that for all New Construction Developments, a minimum of five percent of the total dwelling Units or at least one Unit, whichever is greater, shall be made accessible for individuals with mobility impairments. A Unit that is on an accessible route and is adaptable and otherwise compliant with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS), shall be deemed to meet this requirement. An additional two percent of the total dwelling Units, or at least one Unit, whichever is greater, shall be accessible for individuals with hearing or vision impairments. Additionally, in Developments involving New Construction where some Units are two-stories and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A similar certification will also be required after the Development is completed from an inspector, architect, or accessibility specialist. Any Developments designed as single family structures must also satisfy the requirements of §2306.514, Texas Government Code. (2306.6722 and 2306.6730)

(G) A certification that the Development will be equipped with energy saving devices that meet the standard statewide energy code adopted by the state energy conservation office, unless historic preservation codes permit otherwise for a Development involving historic preservation. All Units must be air-conditioned. The measures must be certified by the Development architect as being included in the design of each tax credit Unit at the time the 10% Test Documentation is submitted and in actual construction upon Cost Certification. (2306.6725(b)(1))

(H) A certification that the Development will be built by a General Contractor that satisfies the requirements of the General Appropriation Act, Article VII, Rider 8(c) applicable to the Department which requires that the General Contractor hired by the Development Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(I) A certification that the Development Owner agrees to establish a reserve account consistent with §2306.186 Texas Government Code and as further described in §1.37 of this title.

(J) A certification that the Applicant, Developer, or any employee or agent of the Applicant has not formed a neighborhood organization for purposes of subsection 50.9(i)(2) of this title, has not given money or a gift to cause the neighborhood organization to take its position of support or opposition, nor has provided any assistance to a neighborhood organization to meet the requirements under 50.9(i)(2) of this title which are not allowed under that subsection, as it relates to the Applicant's Application or any other Application under consideration in 2006.

(K) A certification that the Development Owner will cooperate with the local public housing authority, to the extent there are any, in accepting tenants from their waiting lists (42(m)(1)(C)(vi).

(5) Design Items. This exhibit will provide:

(A) All of the architectural drawings identified in clauses (i) - (iii) of this subparagraph. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving New Construction, or conversion of existing buildings not configured in the Unit pattern proposed in the Application, must provide all of the items identified in clauses (i) - (iii) of this subparagraph. For Developments involving Rehabilitation for which the Unit configurations are not being altered, only the items identified in clauses (i) and (ii) of this subparagraph are required:

(i) a site plan which:

(I) is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(II) identifies all residential and common buildings and amenities; and

(III) clearly delineates the flood plain boundary lines and all easements shown in the site survey;

(ii) floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor and a percentage estimate of the exterior composition; and

(iii) Unit floor plans for each type of Unit showing special accessibility and energy features. The net rentable areas these

Unit floor plans represent should be consistent with those shown in the "Rent Schedule" provided in the application; and

(B) A boundary survey of the proposed Development site and of the property to be purchased. In cases where more property is purchased than the proposed site of the Development, the survey or plat must show the survey calls for both the larger site and the subject site. The survey does not have to be recent; but it must show the property purchased and the property proposed for development. In cases where the site of the Development is only a part of the site being purchased, the depiction or drawing of the Development portion may be professionally compiled and drawn by an architect, engineer or surveyor.

(6) Evidence of the Development's development costs and corresponding credit request and syndication information as described in subparagraphs (A) - (G) of this paragraph.

(A) A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application. (2306.6705(a)(1))

(B) All Developments must submit the "Development Cost Schedule" provided in the Application. This exhibit must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(C) Provide a letter of commitment from a syndicator that, at a minimum, provides an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of housing tax credits requested for allocation to the Development Owner, including pay-in schedules, syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis. (2306.6705(a)(2) and (3))

(D) For Developments located in a Qualified Census Tract (QCT) as determined by the Secretary of HUD and qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C), Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(E) Rehabilitation Developments must submit a Property Condition Assessment meeting the requirements of paragraph (14)(C) of this subsection.

(F) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(G) If projected site work costs include unusual or extraordinary items or exceed $7,500 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis and which ones may be ineligible.

(7) Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) - (D) of this paragraph:

(A) Evidence of Property control in the name of the Development Owner. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All of the sellers of the proposed Property for the 36 months prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development team must be identified at the time of Application (not required at Pre-Application). One of the following items described in clauses (i) - (iii) of this subparagraph must be provided:

(i) a recorded warranty deed; or

(ii) a contract for lease (the minimum term of the lease must be at least 45 years) which is valid for the entire period the Development is under consideration for tax credits; or

(iii) a contract for sale, an exclusive option to purchase or earnest money contract (which must show that the earnest money has been deposited) which is valid for the entire period the Development is under consideration for tax credits. If the acquisition can be characterized as an identity of interest transaction as described in §1.32(e)(1)(B), the following must be provided:

(I) documentation of the original acquisition cost in the form of a settlement statement or, if a settlement statement is not available, the seller's most recent audited financial statement indicating the asset value for the proposed Property, and

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the application,

(-a-) an appraisal meeting the requirements of paragraph (14)(D) of this subsection, and

(-b-) any other verifiable costs of owning, holding, or improving the Property that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include Property taxes, interest expense, a calculated return on equity at a rate consistent with the historical returns of similar risks, the cost of any physical improvements made to the Property, the cost of rezoning, replatting or developing the Property, or any costs to provide or improve access to the Property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, a calculated return on equity at a rate consistent with the historical returns of similar risks, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure.

(iv) As described in clauses (ii) and (iii) of this title, Property control must be continuous. Closing on the Property is acceptable, as long as evidence is provided that there was no period in which control was not retained.

(B) Evidence from the appropriate local municipal authority that satisfies one of clauses (i) - (iii) of this subparagraph. Documentation may be from more than one department of the municipal authority and must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period. (2306.6705(5))

(i) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that the Development is located within the boundaries of a po-

litical subdivision which does not have a zoning ordinance; the letter must also state that the Development fulfills a need for additional affordable rental housing as evidenced in a local consolidated plan, comprehensive plan, or other local planning document; or if no such planning document exists, then the letter from the local municipal authority must state that there is a need for affordable housing.

(ii) a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that:

(I) the Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development or that there is not a zoning requirement; or

(II) the Applicant is in the process of seeking the appropriate zoning and has signed and provided to the political subdivision a release agreeing to hold the political subdivision and all other parties harmless in the event that the appropriate zoning is denied, and a time schedule for completion of appropriate zoning. The Applicant must also provide at the time of Application a copy of the application for appropriate zoning filed with the local entity responsible for zoning approval and proof of delivery of that application in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. Final approval of appropriate zoning must be achieved and documentation of acceptable zoning for the Development, as proposed in the Application, must be provided to the Department at the time the Commitment Fee, or Determination Notice Fee, is paid. If this evidence is not provided with the Commitment Fee, any commitment of credits will be rescinded. No extensions may be requested for the deadline for submitting evidence of final approval of appropriate zoning.

(iii) In the case of a Rehabilitation Development, if the property is currently a non-conforming use as presently zoned, a letter which discusses the items in subclauses (I) - (IV) of this clause:

(I) a detailed narrative of the nature of non-conformance;

(II) the applicable destruction threshold;

(III) owner's rights to reconstruct in the event of damage; and

(IV) penalties for noncompliance.

(C) Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) - (iv) of this subparagraph:

(i) bona fide financing in place as evidenced by:

(I) a valid and binding loan agreement;

(II) deed(s) of trust in the name of the Development Owner expressly allowing transfer to the Development Owner; and

(III) for TX-USDA-RHS 515 Developments involving Rehabilitation, an executed TX-USDA-RHS letter indicating TX-USDA-RHS has received a Consent Request, also referred to as a Preliminary Submittal, as described in 7 CFR 3560.406; or,

(ii) bona fide commitment or term sheet for the interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the Development Owner and which has been executed by the lender (the term of the loan must be for a minimum of 15 years with at least a 30 year amortization). The commitment must state an expiration date and all the terms and conditions applicable to the financing including the mechanism for determining the interest rate, if applicable, and the anticipated interest rate and any required Guarantors. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or,

(iii) any Federal, State or local gap financing, whether of soft or hard debt, must be identified at the time of Application. At a minimum, evidence from the lending agency that an application for funding has been made and a term sheet which clearly describes the amount and terms of the funding, and the date by which the funding determination will be made and any commitment issued, must be submitted. Evidence of application for funding from another Department program is not required except as indicated on the Uniform Application, as long as the Department funding is on a concurrent funding period with the Application submitted and the Applicant clearly indicates that such an application has been filed as required by the Application Submission Procedures Manual. If the commitment from the other funding source has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the other funding source, the Commitment Notice will be rescinded; or

(iv) if the Development will be financed through Development Owner contributions, provide a letter from an Third Party CPA verifying the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed together with a letter from the Development Owner's bank or banks confirming that sufficient funds are available to the Development Owner. Documentation must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(D) Provide the documents in clauses (i) - (iii) of this subparagraph:

(i) a copy of the full legal description

(ii) a current valuation report from the county tax appraisal district and documentation of the current total property tax rate for the proposed Property, and

(iii) a copy of:

(I) the current title policy which shows that the ownership (or leasehold) of the land/Development is vested in the exact name of the Development Owner; or

(II) a current title commitment with the proposed insured matching exactly the name of the Development Owner and the title of the Property/Development vested in the exact name of the seller or lessor as indicated on the sales contract or lease.

(III) if the title policy or commitment is more than six months old as of the day the Application Acceptance Period closes, then a letter from the title company indicating that nothing further has transpired on the policy or commitment.

(8) Evidence in the form of a certification of all of the notifications described in the subparagraphs of this paragraph. Such notices must be prepared in accordance with the "Public Notifications" statement provided in the Application.

(A) Evidence of notification meeting the requirements identified in clause (i) of this subparagraph to all of the individuals and entities identified in clause (ii) of this subparagraph. Evidence of such

notifications must be in the form of a certification in the format provided by the Department that the Applicant made the notifications to all required individuals and entities in the format provided by the Department on or before the deadlines Notification must not be older than three months from the first day of the Application Acceptance Period. (2306.6705(9)) If evidence of these notifications was submitted with the Pre-Application Threshold for the same Application and satisfied the Department's review of Pre-Application Threshold, then no additional notification is required at Application, except that re-notification is required by tax credit Applicants who have submitted a change in the Application, whether from Pre-Application to Application or as a result of a deficiency that reflects a total Unit increase of greater than 10%, an increase of greater than 10% for any given level of AMGI, or a change to the population being served (elderly, Intergenerational Housing or family). For Applications submitted for Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.), notification and proof thereof must not be older than three months prior to the date the Volume III of the Application is submitted.

(i) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes New Construction or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, highrise etc.) and population being served (family, Intergenerational Housing or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the percentage of Units that are market rate;

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Application, which are subject to change as annual changes in the area median income occur; and

(IX) The expected completion date if credits are awarded.

(ii) Notification must be sent to all of the following individuals and entities. Officials to be notified are those officials in office at the time the Application is submitted.

(I) Neighborhood Organizations on record with the state or county. Applicants must provide evidence that neighborhood organizations were notified pursuant to this subsection. Evidence in the form of a certification must be provided that a letter requesting information on neighborhood organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site and meeting the requirements of "Neighborhood Organization Request" as outlined in the Application was sent no later than January 15, 2006 (or for Tax-Exempt Bond Applications or Rural Rescue Applications not later than 21 days prior to submission of the Threshold documentation) to the local elected official for the city or if located outside of a city, then the county where the Development is proposed to be located. If the Development is located in a jurisdiction that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located in a jurisdiction that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. For urban/exurban areas, entities identified in the letters from the local elected official whose boundaries include the proposed Development and whose listed address has the same zip code as the zip code for the Development must be provided with written notification. If any other zip codes exist within a half mile of the Development site, then all entities identified in the letters with those adjacent zip codes must also be provided with written notification. For rural areas, all entities identified in the letters whose listed address is within a half mile of the Development site must be provided with written notification. If the Applicant can certify that there are no neighborhood organizations on a list from the local elected officials which are required to be notified pursuant to this subsection, then such certification in lieu of notification may be acceptable. If no reply letter is received from the local elected officials by February 25, 2006, (or For Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., by 7 days prior to the submission of the Application) then the Applicant must submit a statement attesting to that fact. If an Applicant has knowledge of any neighborhood organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site, the Applicant must notify those organizations. In the event that local elected officials refer the Applicant to another source, the Applicant must also request neighborhood organizations from that source in the same format. If the Applicant has no knowledge of neighborhood organizations within whose boundaries the Development is proposed to be located, the Applicant must attest to that fact in the format provided by the Department as part of the Application.

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of the governing body of any municipality containing the Development;

(V) All elected members of the governing body of any municipality containing the Development;

(VI) Presiding officer of the governing body of the county containing the Development;

(VII) All elected members of the governing body of the county containing the Development;

(VIII) State senator of the district containing the Development; and

(IX) State representative of the district containing the Development.

(B) Signage on Property or Alternative. A Public Notification Sign shall be installed on the Development site prior to the date the Application is submitted. For Tax-Exempt Bond Developments the sign must be installed no later than 30 days after the Department's re-

ceipt of Volumes I and II. Evidence submitted with the Application must include photographs of the site with the installed sign and invoice receipt confirming installation from the entity that installed the sign. The sign must be at least 4 feet by 8 feet in size and located within twenty feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day that the Board takes final action on the Application for the Development. The information and lettering on the sign must meet the requirements identified in the Application. For Tax-Exempt Bond Developments for which the Department is not the issuer of the bonds, the Applicant must certify to the fact that the date, time and location of the TEFRA hearing are indicated on the sign as soon as the hearing has been scheduled. As an alternative to installing a Public Notification Sign and at the same required time, the Applicant may instead, at the Applicant's option, mail written notification to those addresses described in either clause (i) or (ii) of this subparagraph. This written notification must include the information otherwise required for the sign as provided in the Application. If the Applicant chooses to provide this mailed notice in lieu of signage, the final Application must include a map of the proposed Development site and mark the distance required by clause (i) or (ii) of this subparagraph, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. If the option in clause (i) of this subparagraph is used, then evidence must be provided affirming the local zoning notification requirements.

(i) All addresses required for notification by local zoning notification requirements. For example, if the local zoning notification requirement is notification to all those addresses within 200 feet, then that would be the distance used for this purpose; or

(ii) For Developments located in communities that do not have zoning, communities that do not require a zoning notification, or those located outside of a municipality, all addresses located within 1,000 feet of any part of the proposed Development site.

(C) If any of the Units in the Development are occupied at the time of Application, then the Applicant must certify that they have notified each tenant at the Development and let the tenants know of the Department's public hearing schedule for comment on submitted Applications.

(9) Evidence of the Development's proposed ownership structure and the Applicant's previous experience as described in subparagraphs (A) - (E) of this paragraph.

(A) Chart which clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries.

(B) Each Applicant, Development Owner, Developer or Guarantor, or any entity shown on an organizational chart as described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, shall provide the following documentation, as applicable:

(i) For entities that are not yet formed but are to be formed either in or outside of the state of Texas, a certificate of reservation of the entity name from the Texas Secretary of State; or

(ii) For existing entities whether formed in or outside of the state of Texas, evidence that the entity has the authority to do business in Texas or has applied for such authority.

(C) Evidence that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Nonprofit entities, public housing authorities and publicly traded corporations are required to submit documentation for the entities involved; documentation for individual board members and executive directors is required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. The 2006 versions of these forms, as required in the Uniform Application, must be submitted. Units of local government are also required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Person. All participation in any TDHCA funded or monitored activity, including non-housing activities, must be disclosed.

(D) Evidence in the form of a certification from the Applicant, that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, and has, or has had, ownership or Control of affordable housing, being housing that receives any form of financing and/or assistance from any Governmental Entity for the purpose of enhancing affordability to persons of low or moderate income, outside the state of Texas, that such Persons have submitted the appropriate "National Previous Participation and Background Certification Form" to the appropriate Housing Credit Agency for each state in which they have developed or operated affordable housing. Nonprofit entities and public housing authorities are only required to submit documentation for the entity itself; documentation for board members and executive directors is not required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. This form is only necessary when the Developments involved are outside the state of Texas. An original form is not required.

(E) Evidence, in the form of a certification, that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units in the capacity of owner, General Partner or Developer. Evidence must be a certification from the Department that the Person with the experience satisfies this exhibit, as further described under subsection (g)(1) of this section. Applicants must request this certification at least fourteen days prior to the close of the Application Acceptance Period. Applicants must ensure that the Person whose name is on the certification appears in the organizational chart provided in subparagraph (A) of this paragraph.

(10) Evidence of the Development's projected income and operating expenses as described in subparagraphs (A) - (D) of this paragraph:

(A) All Developments must provide a 30-year proforma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties).

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement. (2306.6705(a)(4))

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the

Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate. If there is more than one entity (Section 8 administrator, public housing authority) responsible for setting the utility allowance(s) in the area of the Development location, then the Utility Allowance selected must be the one which most closely reflects the actual utility costs in that Development area. In this case, documentation from the local utility provider supporting the selection must be provided.

(D) Occupied Developments undergoing Rehabilitation must also submit the items described in clauses (i) - (iv) of this subparagraph.

(i) The items in subclauses (I) and (II) of this clause are required unless the current property owner is unwilling to provide the required documentation. In that case, submit a signed statement as to its inability to provide all documentation as described.

(I) Submit at least one of the following:

(-a-) historical monthly operating statements of the subject Development for 12 consecutive months ending not more than 3 months from the first day of the Application Acceptance Period;

(-b-) The two most recent consecutive annual operating statement summaries;

(-c-) the most recent consecutive six months of operating statements and the most recent available annual operating summary;

(-d-) all monthly or annual operating summaries available and a written statement from the seller refusing to supply any other summaries or expressing the inability to supply any other summaries, and any other supporting documentation used to generate projections may be provided; and

(II) a rent roll not more than 6 months old as of the first day the Application Acceptance Period, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease.

(ii) a written explanation of the process used to notify and consult with the tenants in preparing the Application; (2306.6705(a)(6))

(iii) a relocation plan outlining relocation requirements and a budget with an identified funding source; and (2306.6705(a)(6))

(iv) if applicable, evidence that the relocation plan has been submitted to the appropriate legal agency. (2306.6705(a)(6))

(11) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments.

(A) All Applications involving a nonprofit General Partner, regardless of the Set-Aside applied under, must submit all of the documents described in clauses (i) and (ii) of this subparagraph: (2306.6706)

(i) an IRS determination letter which states that the nonprofit organization is a 501(c)(3) or (4) entity; and

(ii) the "Nonprofit Participation Exhibit."

(B) Additionally, all Applications applying under the Nonprofit Set-Aside, established under §50.7(b)(1) of this title, must also provide the following information with respect to the Qualified Nonprofit Organization as described in clauses (i) - (vi) of this subparagraph.

(i) copy of the page from the articles of incorporation or bylaws indicating that one of the exempt purposes of the nonprofit organization is to provide low-income housing;

(ii) copy of the page from the articles of incorporation or bylaws indicating that the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board;

(iii) a Third Party legal opinion stating:

(I) that the nonprofit organization is not affiliated with or Controlled by a for-profit organization and the basis for that opinion, and

(II) that the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside and the basis for that opinion. Eligibility is contingent upon the non-profit organization Controlling the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member; and otherwise meet the requirements of the Code, §42(h)(5);

(iv) a copy of the nonprofit organization's most recent audited financial statement; and

(v) a certification that the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement.

(vi) evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a rural area; or

(II) not more than 90 miles from the Development, if the Development is not located in a rural area.

(12) Applicants applying for acquisition credits must provide must provide

(A) an appraisal meeting the requirements of paragraph (14)(D) of this subsection, and

(B) an "Acquisition of Existing Buildings Form."

(13) Evidence of Financial Statement and Authorization to Release Credit Information. The financial statements and authorization to release credit information must be unbound and clearly labeled. A "Financial Statement and Authorization to Release Credit Information" must be completed and signed for any General Partner, Developer or Guarantor and any Person that has ownership interest in the Development Owner, General Partner, Developer, or Guarantor. Nonprofit entities, public housing authorities and publicly traded corporations are only required to submit documentation for the entities involved; documentation for individual board members and executive directors is not required for this exhibit.

(A) Financial statements for an individual must not be older than 90 days from the date of Application submission.

(B) Financial statements for partnerships or corporations should be for the most recent fiscal year ended 90 days prior to the date of Application submission. An audited financial statement should be provided, if available, and all partnership or corporate financials must be certified. Financial statements are required for

an entity even if the entity is wholly-owned by a Person who has submitted this document as an individual.

(C) Entities that have not yet been formed and entities that have been formed recently but have no assets, liabilities, or net worth are not required to submit this documentation, but must submit a statement with their Application that this is the case.

(14) Supplemental Threshold Reports. All Applications must include documents under subparagraph (A) and (B) of this paragraph. If required under paragraph (6) of this subsection, a Property Condition Assessment as described in subparagraph (C) of this paragraph must be submitted. If required under paragraph (7) or (12) of this subsection, an appraisal as described in subparagraph (D) of this paragraph must be submitted. All submissions must meet the requirements stated in subparagraphs (E) - (G) of this paragraph.

(A) A Phase I Environmental Site Assessment (ESA) report:

(i) prepared by a qualified Third Party;

(ii) dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is more than 12 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated letter or updated report dated not more than three months prior to the first day of the Application Acceptance Period from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report; and

(iii) prepared in accordance with the Department's Environmental Site Assessment Rules and Guidelines, §1.35 of this title.

(iv) Developments whose funds have been obligated by TX-USDA-RHS will not be required to supply this information; however, the Applicants of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) A comprehensive Market Analysis report:

(i) prepared by a Third Party Qualified Market Analyst approved by the Department in accordance with the approval process outlined in the Market Analysis Rules and Guidelines, §1.33 of this title;

(ii) dated not more than 6 months prior to the first day of the Application Acceptance Period. In the event that a Market Analysis is more than 6 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated Market Analysis from the Person or organization which prepared the initial report; however the Department will not accept any Market Analysis which is more than 12 months old as of the first day of the Application Acceptance Period; and

(iii) prepared in accordance with the methodology prescribed in the Department's Market Analysis Rules and Guidelines, §1.33 of this title.

(iv) For Applications in the TX-USDA-RHS Set-Aside, the appraisal, required under paragraph (7) or (12) of this subsection, will satisfy the requirement for a Market Analysis; however the Department may request additional information as needed. (2306.67055) (§42(m)(1)(A)(iii))

(C) A Property Condition Assessment (PCA) report:

(i) prepared by a qualified Third Party;

(ii) dated not more than 6 months prior to the first day of the Application Acceptance Period; and

(iii) prepared in accordance with the Department's Property Condition and Assessment Rules and Guidelines, §1.36 of this title.

(iv) For Developments which require a capital needs assessment from TX-USDA-RHS, the capital needs assessment may be substituted and may be more than 6 months old, as long as TX-USDA-RHS has confirmed in writing that the existing capital needs assessment is still acceptable.

(D) An appraisal report:

(i) prepared by a qualified Third Party;

(ii) dated not more than 6 months prior to the first day of the Application Acceptance Period; and

(iii) prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title.

(iv) For Developments which require an appraisal from TX-USDA-RHS, the appraisal may be more than 6 months old, as long as TX-USDA-RHS has confirmed in writing that the existing appraisal is still acceptable.

(E) Inserted at the front of each of these reports must be a transmittal letter from the individual preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report.

(F) All Applicants acknowledge by virtue of filing an Application that the Department is not bound by any opinion expressed in the report. The Department may determine from time to time that information not required in the Department's Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the report provider or revisions to the report to meet this need. In instances of non-response by the report provider, the Department may substitute in-house analysis.

(G) The requirements for each of the reports identified in subparagraphs (A) - (C) of this paragraph can be satisfied in either of the methods identified in clauses (i) or (ii) of this subparagraph and meet the requirements of clause (iii) of this subparagraph.

(i) Upon Application submission, the documentation for each of these exhibits may be submitted in its entirety; or

(ii) Upon Application submission, the Applicant may provide evidence in the form of an executed engagement letter with the party performing each of the individual reports that the required exhibit has been commissioned to be performed and that the delivery date will be no later than April 1, 2006. In addition to the submission of the engagement letter with the Application, a map must be provided that reflects the Qualified Market Analyst's intended market area. Subsequently, the entire exhibit must be submitted on or before 5:00 p.m. CST, April 1, 2006. If the entire exhibit is not received by that time, the Application will be terminated and will be removed from consideration.

(iii) A single hard copy of the report and a searchable soft copy in the format of a single file containing all information and exhibits in the hard copy report, presented in the order they appear

in the hard copy report on a CD-R clearly labeled with the report type, Development name, and Development location are required.

(15) Self-Scoring. Applicant's self-score must be completed on the "Application Self-Scoring Form." An Applicant may not adjust the Application Self Scoring Form without a request from the Department as a result of an Administrative Deficiency.

(i) Selection Criteria. All Applications will be scored and ranked using the point system identified in this subsection. When applicable, use normal rounding. All Applications, with the exception of TX-USDA-RHS Applications, must score a minimum of 125 points to be eligible for an allocation of Housing Tax Credits. Maximum Total Points: 209.

(1) Financial Feasibility of the Development. Financial Feasibility of the Development based on the supporting financial data required in the Application that will include a Development underwriting pro forma from the permanent or construction lender. (2306.6710(b)(1)(A)) Applications may qualify to receive 28 points for this item. Evidence will include the documentation required for this exhibit in addition to the commitment letter required under subsection (h)(7)(C) of this section. The supporting financial data shall include a thirty year pro forma prepared by the permanent or construction lender specifically identifying each of the first ten years and every fifth year thereafter. The pro forma must indicate that the development pro forma maintains a 1.10 debt coverage ratio throughout the initial thirty years proposed for all third party lenders that require scheduled repayment. In addition, the commitment letter must state that the lender's assessment finds that the Development will be feasible for thirty years. Points will be awarded if these criteria are met. No partial points will be awarded. For Developments receiving financing from TX-USDA-RHS, the form entitled "Sources and Uses Comprehensive Evaluation for Multi-Family Housing Loans" or other form deemed acceptable by the Department shall meet the requirements of this section.

(2) Quantifiable Community Participation from Neighborhood Organizations on Record with the State or County and Whose Boundaries Contain the Proposed Development Site. Points will be awarded based on written statements of support or opposition from neighborhood organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site. (§2306.6710(b)(1)(B); §2306.6725(a)(2)). It is possible for points to be awarded or deducted based on written statements from organizations that were not identified by the process utilized for notification purposes under subsection (h)(8)(A)(ii)(I) of this section if the organization provides the information and documentation required below. It is also possible that neighborhood organizations that were initially identified as appropriate organizations for purposes of the notification requirements will subsequently be determined by the Department not to meet the requirements for scoring.

(A) Basic Submission Requirements for Scoring. Each neighborhood organization may submit one letter (and enclosures) that represents the organization's input. In order to receive a point score, the letter (and enclosures) must be received by the Department no later than April 1, 2006. Letters should be addressed to the Texas Department of Housing and Community Affairs, "Attention: Executive Director (Neighborhood Input)." Letters received after April 1, 2006 will be summarized for the Board's information and consideration, but will not affect the score for the Application. The organization's letter (and enclosures) must:

(i) state the name and location of the proposed Development on which input is provided. A letter may provide input on only one proposed Development; if an organization is eligible to provide input on additional Developments, each Development must be addressed in a separate letter;

(ii) be signed by the chairman of the board, chief executive officer, or comparable head of the organization, and provide the street and/or mailing addresses, phone numbers, and e-mail addresses and/or facsimile numbers for the signer of the letter and for one additional contact for the organization;

(iii) establish that the organization has boundaries, state what the boundaries are, and establish that the boundaries contain the proposed development site. A map must be provided with the geographic boundaries of the organization and the proposed Development site clearly marked within those boundaries;

(iv) establish that the organization is a "neighborhood organization." A "neighborhood organization" is defined as an organization of persons living near one another within the organization's defined boundaries that contain the proposed Development site and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. "Neighborhood organizations" include homeowners associations, property owners associations, and resident councils (only for Rehabilitation or demolition with New Construction applications in which the council is commenting on the rehabilitation or demolition/ New Construction of the property occupied by the residents). "Neighborhood organizations" do not include broader based "community" organizations; organizations that have no members other than board members; chambers of commerce; community development corporations; churches; school related organizations; Lions, Rotary, Kiwanis, and similar organizations; Habitat for Humanity; Boys and Girls Clubs; charities; public housing authorities; or any governmental entity. Organizations whose boundaries include an entire county or larger area are not "neighborhood organizations." Organizations whose boundaries include an entire city are generally not "neighborhood organizations."

(v) include documentation showing that the organization is on record as of March 1, 2006 with the state or county in which the Development is proposed to be located. A record from the Secretary of State showing that the organization is incorporated or from the county clerk showing that the organization is on record with the county is sufficient. For a property owners association, a record from the county showing that the organization's management certificate is on record is sufficient. The documentation must be from the state or county and be current. If an organization's status with the Secretary of State is shown as "forfeited," "dissolved," or any similar status in the documentation provided by the organization, the organization will not be considered on record with the state. It is insufficient to be "on record" to provide only a request to the county or a state entity to be placed on record or to show that the organization has corresponded with such an entity or used its services or programs. It is insufficient to show that the organization is on record with a city. As an option to be considered on record with the state, a letter including a contact name with a mailing address and phone number; name and position of officers; and a written description and map of the organization's geographical boundaries must be received by the Department no later than March 1, 2006 to place the organization on record with the state. The letter should be addressed to the Texas Department of Housing and Community Affairs, "Attention: Executive Director (Recording of Neighborhood Organization)". Acceptance of this documentation by the Department will satisfy the "on record with the state" requirement, but is not a determination that the organization is a "neighborhood organization" or that other requirements are met. The Department is permitted to issue a deficiency notice for this registration process and if satisfied, the organization will still be deemed to be timely placed on record with the state.

(vi) accurately state that the neighborhood organization was not formed by any Applicant, Developer, or any employee or agent of any Applicant in the 2006 tax credit Application Round, that the organization and any member did not accept money or a gift to cause the neighborhood organization to take its position of support or opposition, and has not provided any assistance other than education and information sharing to the neighborhood organization to meet the requirements of this subparagraph for any application in the Application Round (i.e. hosting a public meeting, providing the "TDHCA Information Packet for Neighborhoods" to the neighborhood organization, or referring the neighborhood organization to TDHCA staff for guidance). Applicants may not provide any "production" assistance to meet these requirements for any application in the Application Round (i.e. use of fax machines owned by the Applicant, use of legal counsel related to the Applicant, or assistance drafting a letter for the purposes of this subparagraph).

(vii) state the total number of members of the organization and provide a brief description of the process used to determine the members' position of support or opposition. The organization is encouraged to hold a meeting to which all the members of the organization are invited to consider whether the organization should support, oppose, or be neutral on the proposed Development, and to have the membership vote on whether the organization should support, oppose, or be neutral on the proposed Development. The organization is also encouraged to invite the developer to this meeting.

(viii) include the organization's articles of incorporation and/or bylaws and/or organizational documents created on or before March 1, 2006, that, at a minimum, identify the boundaries of the organization, identify the officers of the organization and clearly indicate the purpose of the organization.

(ix) The boundaries in effect for the organization on March 1, 2006, will be those boundaries utilized for the purposes of evaluating these letters and determining eligibility. Annexations occurring after that time to include a Development site will not be considered eligible. A Development site must be entirely contained within the boundaries of the organization to satisfy eligibility for this item; a site that is only partially within the boundaries will not satisfy the requirement that the boundaries contain the proposed Development site.

(x) Letters from organizations, and subsequent correspondence from organizations, may not be provided via the Applicant which includes facsimile and email communication.

(B) Scoring of Letters (and Enclosures). The input must clearly and concisely state each reason for the organization's support for or opposition to the proposed Development.

(i) The score awarded for each letter for this exhibit will range from a maximum of +24 for the strongest position of support to +12 for the neutral position to 0 for the strongest position of opposition. The number of points to be allocated to each organization's letter will be based on the organization's letter and evidence enclosed with the letter. The final score will be determined by the Executive Director. The Department may investigate a matter and contact the Applicant and neighborhood organizations for more information. The Department may consider any relevant information specified in letters from other neighborhood organizations regarding a development in determining a score.

(ii) The Department highly values quality public input addressed to the merits of a Development. Input that points out matters that are specific to the neighborhood, the proposed site, the proposed Development, or Developer are valued. If a proposed Development is permitted by the existing or pending zoning or absence of zoning, concerns addressed by the allowable land use that are related to any multifamily development may generally be considered to have been addressed at the local level through the land use planning process. Input concerning positive efforts or the lack of efforts by the Applicant to inform and communicate with the neighborhood about the proposed Development is highly valued. If the neighborhood organization refuses to communicate with the Applicant the efforts of the Applicant will not be considered negative. Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered.

(iii) In general, letters that meet the requirements of this paragraph and

(I) establish three or more reasons for support or opposition will be scored the maximum points for either support (+24 points) or opposition (zero);

(II) establish two reasons for support or opposition will be scored up to +18 points for support or +6 points for opposition;

(III) establish one reason for support or opposition will be scored +13 points for support or +11 points for opposition;

(IV) that do not establish a reason for support or opposition or that are unclear will be scored as neutral (+12 points).

(iv) Applications for which no letters from neighborhood organizations are scored will receive a neutral score of +12 points.

(C) Basic Submission Deficiencies. The Department is authorized but not required to request that the neighborhood organization provide additional information or documentation the Department deems relevant to clarify information contained in the organization's letter (and enclosures). If the Department determines to request additional information from an organization, it will do so by e-mail or facsimile to the e-mail address or facsimile number provided with the organization's letter. If the deficiencies are not clarified or corrected in the Department's determination within seven business days from the date the e-mail or facsimile is sent to the organization, the organization's letter will not be considered further for scoring and the organization will be so advised. This potential deficiency process does not extend any deadline required above for the "Quantifiable Community Participation" process. An organization may not submit additional information or documentation after the April 1, 2006 deadline except in response to an e-mail or facsimile from the Department specifically requesting additional information.

(3) The Income Levels of Tenants of the Development. Applications may qualify to receive up to 22 points for qualifying under only one of subparagraphs (A) - (F) of this paragraph. To qualify for these points, the tenant incomes must not be higher than permitted by the AMGI level. The Development Owner, upon making selections for this exhibit, will set aside Units at the levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. These income levels require corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g), Internal Revenue Code. (2306.6710(b)(1)(C); 2306.111(g)(3)(B); 2306.6710(e); 42(m)(1)(B)(ii)(I); 2306.111(g)(3)(E))

(A) 22 points if at least 80% of the Total Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(B) 22 points if at least 10% of the Total Units in the Development are set-aside with incomes at or below 30% of AMGI; or

(C) 20 points if at least 60% of the Total Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(D) 18 points if at least 40% of the Total Units in the Development are set-aside with incomes at or below a combination of 50% and 30% of AMGI in which at least 5% of the Total Units are at or below 30% of AMGI; or

(E) 16 points if at least 40% of the Total Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(F) 14 points if at least 35% of the Total Units in the Development are set-aside with incomes at or below 50% of AMGI.

(4) The Size and Quality of the Units (Development Characteristics). Applications may qualify to receive up to 20 points. Applications may qualify for points under both subparagraphs (A) and (B) of this paragraph. (2306.6710(b)(1)(D); 42(m)(1)(C)(iii))

(A) Size of the Units. Applications may qualify to receive 6 points. The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Six points for this item will be automatically granted for Applications involving Rehabilitation, Developments receiving funding from TX-USDA-RHS, or Developments proposing single room occupancy without meeting these square footage minimums. The square feet of all of the Units in the Development, for each type of Unit, must be at least the minimum noted below.

(i) 500 square feet for an efficiency unit;

(ii) 650 square feet for a non-elderly one bedroom unit; 550 square feet for an elderly one bedroom unit;

(iii) 900 square feet for a non-elderly two bedroom unit; 750 square feet for an elderly two bedroom unit;

(iv) 1,000 square feet for a three bedroom unit; and

(v) 1,200 square feet for a four bedroom unit.

(B) Quality of the Units. Applications may qualify to receive up to 14 points. Applications in which Developments provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) - (xx) of this subparagraph, not to exceed 14 points in total. Applications involving scattered site Developments must have at least half of the Units located with a specific amenity to count for points. Applications involving Rehabilitation or single room occupancy may double the points listed for each item, not to exceed 14 points in total.

(i) Covered entries (1 point);

(ii) Nine foot ceilings (1 point);

(iii) Microwave ovens (1 point);

(iv) Self-cleaning or continuous cleaning ovens (1 point);

(v) Ceiling fixtures in all rooms (light with ceiling fan in all bedrooms) (1 point);

(vi) Refrigerator with icemaker (1 point);

(vii) Laundry connections (2 points);

(viii) Storage room or closet, of approximately 9 square feet or greater, which does not include bedroom, entryway or linen closets - does not need to be in the Unit but must be on the property site (1 point);

(ix) Laundry equipment (washers and dryers) for each individual unit (3 points);

(x) Thirty year architectural shingle roofing (1 point);

(xi) Covered patios or covered balconies (1 point);

(xii) Covered parking (including garages) of at least one covered space per Unit (2 points);

(xiii) 100% masonry on exterior, which can include stucco, cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS or synthetic stucco (3 points);

(xiv) Greater than 75% masonry on exterior, which can include stucco and cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS or synthetic stucco EFIS (1 points);

(xv) Use of energy efficient alternative construction materials (for example, Structural Insulated Panel construction) with wall insulation at a minimum of R-20 (3 points).

(xvi) R-15 Walls / R-30 Ceilings (rating of wall system) (3 points);

(xvii) 14 SEER HVAC for New Construction or radiant barrier in the attic for Rehabilitation (3 points);(WG)

(xviii) Energy Star or equivalently rated refrigerators and dishwashers (2 points); or

(xix) High Speed Internet service to all Units at no cost to residents (2 points).

(xx) Fire sprinklers in all Units (2 points).

(5) The Commitment of Development Funding by Local Political Subdivisions. Applications may qualify to receive up to 18 points for qualifying under this paragraph. An Applicant may submit several sources to substantiate points for this section in the Application, but may not substitute any source after the Application has been submitted to the Department. Use normal rounding (2306.6710(b)(1)(E)) Evidence that the proposed Development has received an allocation of funds for on-site development costs from a Local Political Subdivision or a properly-created governmental instrumentality thereof. An Applicant may receive points under this subparagraph even if the government instrumentality's creating statute states that the entity is not itself a "political subdivision." An Applicant whose Development receives a commitment from a governmental instrumentality with the legal authority to act on behalf of a Local Political Subdivision is also eligible for such points. In addition to loans or grants, in-kind contributions such as donation of land or waivers of fees such as building permits, water and sewer tap fees, or similar contributions that benefit the Development will be acceptable to qualify for these points. Points will be determined on a sliding scale based on the amount per Unit. Evidence to be submitted with the Application must include a copy of the commitment of funds; a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received; or a certification of intent to apply for funding that indicates the funding entity and program to which the application will be submitted, the loan amount to be applied for and the specific proposed terms. For in-kind contributions, evidence must be submitted to substantiate the value claimed for points as well as a statement of how the contribution will benefit the Development. At the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the governing body of the local political subdivision for the sufficient local funding to the Department. If the funding commitment from the local political subdivision has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the

Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the local political subdivision's funds, the Commitment Notice will be rescinded and the credits reallocated. No funds from TDHCA's HOME (with the exception of Developments located in non-Participating Jurisdictions) or Housing Trust Fund sources will qualify under this category unless a resolution is submitted with the application from the Local Political Subdivision authorizing that the Applicant act on behalf of the Local Political Subdivision in applying for HOME or Housing Trust Funds from TDHCA for the particular application. The Local Political Subdivision must attest to the fact that any funds committed were not first provided to the Local Political Subdivision by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision or subsidiary.

(A) A contribution of $500 to $1,000 per Low-income Unit receives 6 points; or

(B) A contribution of $1,001 to $3,500 per Low-income Unit receives 12 points; or

(C) A contribution of $3,501 or more per Low-income Unit receives 18 points; or

(6) The Level of Community Support from State Elected Officials. The level of community support for the application, evaluated on the basis of written statements from state elected officials. (2306.6710(b)(1)(F) and (f) and (g); 2306.6725(a)(2)) Applications may qualify to receive up to 14 points for this item. Points will be awarded based on the written statements of support or opposition from state elected officials representing constituents in areas that include the location of the Development. Letters of support must identify the specific Development and must clearly state support for or opposition to the specific Development. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or official by April 1, 2005. Officials to be considered are those officials in office at the time the Application is submitted. Letters of support from state officials that do not represent constituents in areas that include the location of the Development will not qualify for points under this Exhibit. Neutral letters, or letters that do not specifically refer to the Development, will receive neither positive nor negative points. Letters from State of Texas Representative or Senator: support letters are 7 points each for a maximum of 14 points; opposition letters are -7 points each for a maximum of -14 points.

(7) The Rent Levels of the Units. Applications may qualify to receive up to 12 points for qualifying under this exhibit. (2306.6710(b)(1)(G)) If 80% or fewer of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 7 points. If between 81% and 85% of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 8 points. If between 86% and 90% of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 9 points. If between 91% and 95% of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 10 points. If greater than 95% of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 12 points. Developments that are scattered site will receive the full 12 points provided that they have received points under paragraph (3) of this subsection.

(8) The Cost of the Development by Square Foot (Development Characteristics). Applications may qualify to receive 10 points for this item. (2306.6710(b)(1)(H); 42(m)(1)(C)(iii)) For this exhibit, costs shall be defined as construction costs, including site work, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of net rentable area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application. Developments qualify for 10 points if their costs do not exceed $80 per square foot for Qualified Elderly, transitional, and single room occupancy Developments (transitional housing for the homeless and single room occupancy units as provided in the Code, §42(i)(3)(B)(iii) and (iv)), unless located in a "First Tier County" in which case their costs do not exceed $82 per square foot; and $70 for all other Developments, unless located in a "First Tier County" in which case their costs do not exceed $72 per square foot. For 2005, the First Tier Counties are Aransas, Calhoun, Chambers, Jefferson, Kleberg, Nueces, San Patricio, Brazoria, Cameron, Galveston, Kennedy, Matagorda, Refugio and Willacy. (10 points)

(9) The Services to be Provided to Tenants of the Development. Applications may qualify to receive up to 8 points. Applications may qualify for points under both subparagraphs (A) and (B) of this paragraph. (2306.6710(b)(1)(I); 2306.254; 2306.6725(a)(1); General Appropriation Act, Article VII, Rider 7)

(A) Applicants will receive points for coordinating their tenant services with those services provided through state workforce development and welfare programs as evidenced by execution of a Tenant Supportive Services Certification (2 points).

(B) The Applicant must certify that the Development will provide a combination of special supportive services appropriate for the proposed tenants. The provision of supportive services will be included in the LURA as selected from the list of services identified in this subparagraph. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided (maximum of 6 points).

(i) Applications will be awarded points for selecting services listed in clause (ii) of this subparagraph based on the following scoring range:

(I) Two points will be awarded for providing two of the services; or

(II) Four points will be awarded for providing four of the services; or

(III) Six points will be awarded for providing six of the services.

(ii) Service options include child care; transportation; basic adult education; legal assistance; counseling services; GED preparation; English as a second language classes; vocational training; home buyer education; credit counseling; financial planning assistance or courses; health screening services; health and nutritional courses; organized team sports programs or youth programs; scholastic tutoring; any other programs described under Title IV-A of the Social Secu-

rity Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; any services addressed by §2306.254 Texas Government Code; or any other services approved in writing by the Department.

(10) Housing Needs Characteristics. (42(m)(1)(C)(ii)) Applications may qualify to receive up to 7 points. Each Application, based on the Area or county where the Development is located, will receive a score based on the Uniform Housing Needs Scoring Component. If a Development is in a place, the Area score will be used. If a Development is not within a place, then the county score will be used. The Uniform Housing Needs Scoring Component scores for each Area and county will be published in the Reference Manual.

(11) Development Includes the Use of Existing Housing as part of a Community Revitalization Plan (Development Characteristics). Applications may qualify to receive 7 points for this item. (42(m)(1)(C)(iii)) The Development is an existing Residential Development and the proposed Rehabilitation or demolition and reconstruction is part of a Community Revitalization Plan. Evidence of the Community Revitalization Plan and a map showing the boundaries of the Community Revitalization Plan and the location of the Development site within the boundaries must be submitted.

(12) Pre-Application Participation Incentive Points. (2306.6704) Applications which submitted a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph will qualify to receive 6 points for this item. To be eligible for these points, the Application must:

(A) be for the identical site as the proposed Development in the Pre-Application;

(B) have met the Pre-Application Threshold Criteria;

(C) be serving the same target population (family, Intergenerational Housing, or elderly) as in the Pre-Application;

(D) be serving the same target Set-Asides as indicated in the Pre-Application (Set-Asides can be dropped between Pre-Application and Application, but no Set-Asides can be added); and

(E) be awarded by the Department an Application score that is not more than 5% greater or less than the number of points awarded by the Department at Pre-Application, with the exclusion of points for support and opposition under subsections (i)(2) and (i)(6) of this title. An Applicant must choose, at the time of Application either clause (i) or (ii) of this subparagraph:

(i) to request the Pre-Application points and have the Department cap the Application score at no greater than the 5% increase regardless of the total points accumulated in the scoring evaluation. This allows an Applicant to avoid penalty for increasing the point structure outside the 5% range from Pre-Application to Application; or

(ii) to request that the Pre-Application points be forfeited and that the Department evaluate the Application as requested in the self-scoring sheet.

(13) Development Location. (2306.6725(a)(4)); 42(m)(1)(C)(i)) Applications may qualify to receive 4 points. Evidence, not more than 6 months old from the date of the close of the Application Acceptance Period, that the subject Property is located within one of the geographical areas described in subparagraphs (A) - (H) of this paragraph. Areas qualifying under any one of the subparagraphs (A) - (H) of this paragraph will receive 4 points. An Application may only receive points under one of the subparagraphs (A) - (H) of this paragraph.

(A) A geographical Area which is an Economically Distressed Area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD (2306.1273).

(B) a designated state or federal empowerment/enterprise zone, urban enterprise community, or urban enhanced enterprise community. Such Developments must submit a letter and a map from a city/county official verifying that the proposed Development is located within such a designated zone. Letter should be no older than 6 months from the first day of the Application Acceptance Period. (General Appropriation Act, Article VII, Rider 6; 2306.127)

(C) a city or county-sponsored area or zone where a city or county has, through a local government initiative, specifically encouraged or channeled growth, neighborhood preservation, or redevelopment. Such Developments must submit all of the following documentation: a letter from a city/county official verifying that the proposed Development is located within the city or county-sponsored zone or district; a map from the city/county official which clearly delineates the boundaries of the district; and a certified copy of the appropriate resolution or documentation from the mayor, local city council, county judge, or county commissioners court which documents that the designated Area was created by the local city council/county commission, and targets a specific geographic Area which was not created solely for the benefit of the Applicant.

(D) the Development is located in a county that has received an award as of November 15, 2005, within the past three years, from the Texas Department of Agriculture's Rural Municipal Finance Program or Real Estate Development and Infrastructure Program. Cities which have received one of these awards are categorized as awards to the county as a whole so Developments located in a different city than the city awarded, but in the same county, will still be eligible for these points.

(E) the Development is located in a census tract in which there are no other existing developments supported by housing tax credits. Applicant must provide evidence. (2306.6725(b)(2))

(F) the Development is located in a census tract which has a median family income (MFI), as published by the United States Bureau of the Census (U.S. Census), that is higher than the median family income for the county in which the census tract is located. This comparison shall be made using the most recent data available as of the date the Application Round opens the year preceding the applicable program year. Developments eligible for these points must submit evidence documenting the median income for both the census tract and the county.

(G) the proposed Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and is proposed to be located in an elementary school attendance zone of an elementary school that has an academic rating of "Exemplary" or "Recognized," or comparable rating if the rating system changes. The date for consideration of the attendance zone is that in existence as of the opening date of the Application Round and the academic rating is the most current rating determined by the Texas Education Agency as of that same date. (42(m)(1)(C)(vii))

(H) the proposed Development will expand affordable housing opportunities for low-income families with children outside of poverty areas. This must be demonstrated by showing that the Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and that the

census tract in which the Development is proposed to be located has no greater than 10% poverty population according to the most recent census data. (42(m)(1)(C)(vii))

(14) Exurban Developments or Reconstruction or Rehabilitation of Developments (Development characteristics). (2306.6725(a)(4) and (b)(2); 2306.127; 42(m)(1)(C)(i)) Applications may qualify to receive 7 points if the Development is located in an incorporated place or census designated place that is not a Rural Area but has a population no greater than 100,000 based on the most current available information published by the United States Bureau of the Census as of October 1 of the year preceding the applicable program year, or if a Development is proposed for reconstruction or rehabilitation (in whole or in part, on-site or off-site) that will be financed, in part, with HOPE VI financing or HUD capital grant financing provided that the Application is a joint venture partnership between the public housing authority or an entity formed by the public housing authority and private market interests (either for profit or nonprofit).

(15) Tenant Populations with Special Housing Needs. Applications may qualify to receive 4 points for this item. (42(m)(1)(C)(v)) The Department will award these points to Applications in which at least 10% of the Units are set aside for Persons with Special Needs. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development owner agrees to affirmatively market Units to Persons with Special needs. In addition, the Department will require a minimum 12 month period during which units must either be occupied by persons with Special Needs or held vacant. The 12 month period will begin on the date each building receives its certificate of occupancy. For buildings that do not receive a Certificate of Occupancy, the 12 month period will begin on the placed in service date as provided in the Cost Certification manual. After the 12 month period, the owner will no longer be required to hold units vacant for households with special needs, but will be required to continue to affirmatively market units to household with special needs.

(16) Length of Affordability Period. Applications may qualify to receive up to 4 points. (2306.6725(a)(5); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); 42(m)(1)(B)(ii)(II)) In accordance with the Code, each Development is required to maintain its affordability for a 15-year compliance period and, subject to certain exceptions, an additional 15-year extended use period. Development Owners that are willing to extend the affordability period for a Development beyond the 30 years required in the Code may receive points as follows:

(A) Add 5 years of affordability after the extended use period for a total affordability period of 35 years (2 points); or

(B) Add 10 years of affordability after the extended use period for a total affordability period of 40 years (4 points)

(17) Site Characteristics. Sites will be evaluated based on proximity to amenities, the presence of positive site features and the absence of negative site features. Sites will be rated based on the criteria below.

(A) Proximity of site to amenities. Developments located on sites within a one mile radius (two-mile radius for Developments competing for a Rural Regional Allocation) of at least three services appropriate to the target population will receive four points. A site located within one-quarter mile of public transportation that is accessible to persons with disabilities and/or located within a community that has "on demand" transportation, special transit service, or specialized elderly transportation for Qualified Elderly Developments, will receive full points regardless of the proximity to amenities, as long as the Applicant provides appropriate evidence of the transportation services used to satisfy this requirement. If a Development is providing its own specialized van or on demand service, then this will be a requirement of the LURA. Only one service of each type listed below will count towards the points. A map must be included identifying the development site and the location of the services. The services must be identified by name on the map. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction, must be at least 50% complete by the date the Application is submitted. (4 points)

(i) Full service grocery store or supermarket

(ii) Pharmacy

(iii) Convenience Store/Mini-market

(iv) Department or Retail Merchandise Store

(v) Bank/Credit Union

(vi) Restaurant (including fast food)

(vii) Indoor public recreation facilities, such as civic centers, community centers, and libraries

(viii) Outdoor public recreation facilities such as parks, golf courses, and swimming pools

(ix) Hospital/medical clinic

(x) Doctor's offices (medical, dentistry, optometry)

(xi) Public Schools (only eligible for Developments that are not Qualified Elderly Developments)

(xii) Senior Center (only eligible for Qualified Elderly Developments)

(B) Negative Site Features. Sites with the following negative characteristics will have points deducted from their score. For purpose of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development site. The distances are to be measured from all boundaries of the Development site. If an Applicant negligently fails to note a negative feature, double points will be deducted from the score or the Application may be terminated. If none of these negative features exist, the Applicant must sign a certification to that effect. (-5 points)

(i) Developments located adjacent to or within 300 feet of junkyards will have 1 point deducted from their score.

(ii) Developments located adjacent to or within 300 feet of active railroad tracks will have 1 point deducted from their score. Rural Developments funded through TX-USDA-RHS are exempt from this point deduction.

(iii) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants will have 1 point deducted from their score.

(iv) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills will have 1 point deducted from their score.

(v) Developments located adjacent to or within 100 feet of high voltage transmission power lines will have 1 point deducted from their score.

(18) Development Size. The Development consists of not more than 36 Units and is not a part of, or contiguous to, a larger existing tax credit development (3 points).

(19) Qualified Census Tracts with Revitalization. Applications may qualify to receive 2 points for this item. (42(m)(1)(B)(ii)(III)) Applications will receive the points for this

item if the Development is located within a Qualified Census Tract and contributes to a concerted Community Revitalization Plan. Evidence of the Community Revitalization Plan and a map showing boundaries of the Community Revitalization Plan and the location of the Development site within the boundaries must be submitted.

(20) Sponsor Characteristics. Applications may qualify to receive a maximum of 2 points for this item for qualifying under either subparagraph (A) or (B) of this paragraph. (42(m)(1)(C)(iv))

(A) An Application will receive these two points for submitting a plan to use Historically Underutilized Businesses in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas.

(B) An Application will receive these points if there is evidence that a HUB that does not meet the experience requirements under §50.9(g) of this title, as certified by the Texas Building and Procurement Commission, has at least 51% ownership interest in the General Partner and materially participates in the development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Building and Procurement Commission that the Person is a HUB at the close of the Application Acceptance Period. The HUB will be disqualified from receiving these points if any Principal of the HUB has developed, and received 8609's for, more than two Developments involving tax credits. Additionally, to qualify for these points, the HUB must partner with an experienced developer (as defined by §50.9 of this title); the experienced developer, as an Affiliate, will not be subject to the credit limit described under §50.6(d) of this title for one application per Application Round. For purposes of this section the experienced developer may not be a Related Party to the HUB.

(21) Developments Intended for Eventual Tenant Ownership - Right of First Refusal. Applications may qualify to receive 1 point for this item. (2306.6725(b)(1)) (42(m)(1)(C)(viii)) Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department, or either an individual tenant with respect to a single family building, or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms.

(A) Upon the earlier to occur of:

(i) the Development Owner's determination to sell the Development; or

(ii) the Development Owner's request to the Department, pursuant to §42(h)(6)(E)(II) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) during the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. §92.1 (a "CHDO") and is approved by the Department,

(ii) during the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) during the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After whichever occurs the later of:

(i) the end of the Compliance Period; or

(ii) two years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific per-

formance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(22) Leveraging of Private, State, and Federal Resources. Applications may qualify to receive 1 point for this item. (2306.6725(a)(3)) Evidence that the proposed Development has received an allocation of private, state or federal resources, including HOPE VI funds, that is equal to or greater than 2% of the Total Development costs reflected in the Application. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application. The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds or a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. At the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the governing body of the entity for the sufficient financing to the Department. If the funding commitment from the private, state or federal source has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the commitment from the private, state or federal source, the Commitment Notice will be rescinded and the credits reallocated. Use normal rounding. Funds from the Department's HOME and Housing Trust Fund sources will only qualify under this category if there is a Notice of Funding Availability (NOFA) out for available funds and the Applicant is eligible under that NOFA. To qualify for this point, the Rent Schedule must show that at least 3% of all low-income Units are designated to serve individuals or families with incomes at or below 30% of AMGI.

(23) Third-Party Funding Commitment Outside of Qualified Census Tracts. Applications may qualify to receive 1 point for this item. (2306.6710(e)(1)) Evidence that the proposed Development has documented and committed third-party funding sources and the Development is located outside of a Qualified Census Tract. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application. The commitment of funds (an application alone will not suffice) must already have been received from the third-party funding source and must be equal to or greater than 2% of the Total Development costs reflected in the Application. Funds from the Department's HOME and Housing Trust Fund sources will not qualify under this category. The third-party funding source cannot be a loan from a commercial lender.

(24) Scoring Criteria Imposing Penalties. (2306.6710(b)(2))

(A) Penalties will be imposed on an Application if the Applicant has requested an extension of a Department deadline, and did not meet the original submission deadline, relating to developments receiving a housing tax credit commitment made in the application round preceding the current round. The extension that will receive a penalty is an extension related to the submission of the carryover. For each extension request made, the Applicant will receive a 5 point deduction for not meeting the Carryover deadline. Subsequent extension requests for carryover after the first extension request made for each development from the preceding round will not result in a further point reduction than already described. No penalty points or fees will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve TX-USDA-RHS as a lender if TX-USDA-RHS or the Department is the cause for the Applicant not meeting the deadline.

(B) Penalties will be imposed on an Application if the Developer or Principal of the Applicant has been removed by the lender, equity provider, or limited partners in the past five years for failure to perform its obligations under the loan documents or limited partnership agreement. An affidavit will be provided by the Applicant and the Developer certifying that they have not been removed as described, or requiring that they disclose each instance of removal with a detailed description of the situation. If an Applicant or Developer submits the affidavit, and the Department learns at a later date that a removal did take place as described, then the Application will be terminated and any Allocation made will be rescinded. The Applicant, Developers or Principals of the Applicant that are in court proceedings at the time of Application must disclose this information and the situation will be evaluated on a case-by-case basis. 3 points will be deducted for each instance of removal.

(j) Tie Breaker Factors.

(1) In the event that two or more Applications receive the same number of points in any given Set-Aside category, Rural Regional Allocation or Urban/Exurban Regional Allocation, or Uniform State Service Region, and are both practicable and economically feasible, the Department will utilize the factors in this paragraph, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment.

(A) Applications involving any Rehabilitation of existing Units will win this first tier tie breaker over Applications involving solely New Construction.

(B) The Application located in the municipality or, if located outside a municipality, the county, that has the lowest state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins as reflected in the Reference Manual will win this second tier tie breaker.

(C) The amount of requested tax credits per net rentable square foot requested (the lower credits per square foot has preference)

(2) This clause identifies how ties will be handled when dealing with the restrictions on location identified in §50.5(a)(8) of this title, and in dealing with any issues relating to capture rate calculation. When two Tax-Exempt Bond Developments would violate one of these restrictions, and only one Development can be selected, the Department will utilize the reservation docket number issued by the Texas Bond Review Board in making its determination. When two competitive Housing Tax Credits Applications in the Application Round would violate one of these restrictions, and only one Development can be selected, the Department will utilize the tie breakers identified in paragraph (1) of this subsection. When a Tax-Exempt Bond Development and a competitive Housing Tax Credit Application in the Application Round would both violate a restriction, the following determination will be used:

(A) Tax-Exempt Bond Developments that receive their reservation from the Bond Review Board on or before April 30, 2006 will take precedence over the Housing Tax Credit Applications in the 2006 Application Round;

(B) Housing Tax Credit Applications approved by the Board for tax credits in July 2006 will take precedence over the Tax-Exempt Bond Developments that received their reservation from the Bond Review Board on or between May 1, 2006 and July 31, 2006; and

(C) After July 31, 2006, a Tax-Exempt Bond Development with a reservation from the Bond Review Board will take precedence over any Housing Tax Credit Application from the 2006 Application Round on the Waiting List. However, if no reservation has been issued by the date the Board approves an allocation to a Development from the Waiting List of Applications in the 2006 Application Round or a forward commitment, then the Waiting List Application or forward commitment will be eligible for its allocation.

(k) Staff Recommendations. (2306.1112 and 2306.6731) After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Executive Award and Review Advisory Committee. The Committee will develop funding priorities and shall make commitment recommendations to the Board. Such recommendations and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The Committee will provide written, documented recommendations to the Board which will address at a minimum the financial or programmatic viability of each Application and a list of all submitted Applications which enumerates the reason(s) for the Development's proposed selection or denial, including all factors provided in §50.10(a) of this title that were used in making this determination.

§50.10. Board Decisions; Waiting List; Forward Commitments.

(a) Board Decisions. The Board's decisions shall be based upon the Department's and the Board's evaluation of the proposed Developments' consistency with the criteria and requirements set forth in this QAP and Rules.

(1) On awarding tax credits, the Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, and the reasons for any decision that conflicts with the recommendations made by Department staff. The Board may not make, without good cause, a commitment decision that conflicts with the recommendations of Department staff. Good cause includes the Board's decision to apply discretionary factors. (2306.6725(c); 42(m)(1)(A)(iv); 2306.6731)

(2) In making a determination to allocate tax credits, the Board shall be authorized to not rely solely on the number of points scored by an Application. It shall in addition, be entitled to take into account, as it deems appropriate, the discretionary factors listed in this paragraph. The Board may also apply these discretionary factors to its consideration of Tax-Exempt Bond Developments. If the Board disapproves or fails to act upon an Application, the Department shall issue to the Applicant a written notice stating the reason(s) for the Board's disapproval or failure to act. In making tax credit decisions (including those related to Tax-Exempt Bond Developments), the Board, in its discretion, may evaluate, consider and apply any one or more of the following discretionary factors: (2306.111(g)(3); 2306.0661(f))

(A) the developer market study;

(B) the location;

(C) the compliance history of the Developer;

(D) the Applicant and/or Developer's efforts to engage the neighborhood;

(E) the financial feasibility;

(F) the appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;

(G) the housing needs of the community, area, region and state;

(H) the Development's proximity to other low-income housing developments;

(I) the availability of adequate public facilities and services;

(J) the anticipated impact on local school districts;

(K) zoning and other land use considerations;

(L) laws relating to fair housing including affirmatively furthering fair housing;

(M) the efficient use of the tax credits;

(N) consistency with local needs, including consideration of revitalization or preservation needs;

(O) the allocation of credits among many different entities without diminishing the quality of the housing; (General Appropriation Act, Article VII, Rider 8(e))

(P) meeting a compelling housing need;

(Q) providing integrated, affordable housing for individuals and families with different levels of income;

(R) the inclusive capture rate as described under §1.32(g)(2);

(S) any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes and the policies of Chapter 2306, Texas Government Code; or

(T) other good cause as determined by the Board.

(3) Before the Board approves any Application, the Department shall assess the compliance history of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development, including compliance information provided by the Texas State Affordable Housing Corporation. The Committee shall provide to the Board a written report regarding the results of the assessments. The written report will be included in the appropriate Development file for Board and Department review. The Board shall fully document and disclose any instances in which the Board approves a Development Application despite any noncompliance associated with the Development or Applicant. (2306.057)

(b) Waiting List. (2306.6711(c) and (d)) If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate, concurrently with the issuance of commitments, a waiting list of additional Applications ranked by score in descending order of priority based on Set-Aside categories and regional allocation goals. The Board may also apply discretionary factors in determining the Waiting List. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment Notice to Applications on the waiting list subject to the amount of returned credits, the regional allocation goals and the Set-Aside categories, including the 10% Nonprofit Set-Aside alloca-

tion required under the Code, §42(h)(5). At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Forward Commitments. The Board may determine to issue commitments of tax credit authority with respect to Applications from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment") to Applications submitted in accordance with the rules and timelines required under this rule and the Application Submission Procedures Manual. The Board will utilize its discretion in determining the amount of credits to be allocated as forward commitments and the reasons for those commitments considering score and discretionary factors. The Board may utilize the forward commitment authority to allocate credits to TX-USDA-RHS Developments which are experiencing foreclosure or loan acceleration at any time during the 2006 calendar year, also referred to as Rural Rescue Developments. Applications that are submitted under the 2006 QAP and granted a Forward Commitment of 2007 Housing Tax Credits are considered by the Board to comply with the 2007 QAP by having satisfied the requirements of this 2006 QAP, except for statutorily required QAP changes.

(1) Unless otherwise provided in the Commitment Notice with respect to a Development selected to receive a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the Credit Ceiling from which the credits are allocated.

(2) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. If a forward commitment shall be made with respect to a Development placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(3) If tax credit authority shall become available to the Department in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Development which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Development.

§50.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

(a) Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants.

(1) Within approximately seven business days after the close of the Pre-Application Acceptance Period, the Department shall publish a Pre-Application Submission Log on its web site. Such log shall contain the Development name, address, Set-Aside, number of units, requested credits, owner contact name and phone number. (2306.6717(a)(1))

(2) Approximately 30 days before the close of the Application Acceptance Period, the Department will release the evaluation and assessment of the Pre-Applications on its web site.

(3) Not later than 14 days after the close of the Pre-Application Acceptance Period, or Application Acceptance Period for Applications for which no Pre-Application was submitted, the Department shall: (2306.1114)

(A) publish an Application submission log on its web site.

(B) give notice of a proposed Development in writing that provides the information required under clause (i) of this subparagraph to all of the individuals and entities described in clauses (ii) - (x) of this subparagraph. (2306.6718(a) - (c))

(i) The following information will be provided in these notifications:

(I) The relevant dates affecting the Application including the date on which the Application was filed, the date or dates on which any hearings on the Application will be held and the date by which a decision on the Application will be made;

(II) A summary of relevant facts associated with the Development;

(III) A summary of any public benefits provided as a result of the Development, including rent subsidies and tenant services; and

(IV) The name and contact information of the employee of the Department designated by the director to act as the information officer and liaison with the public regarding the Application.

(ii) Presiding officer of the governing body of the political subdivision containing the Development (mayor or county judge) to advise such individual that the Development, or a part thereof, will be located in his/her jurisdiction and request any comments which such individual may have concerning such Development.

(iii) If the Department receives a letter from the mayor or county judge of an affected city or county that expresses opposition to the Development, the Department will give consideration to the objections raised and will offer to visit the proposed site or Development with the mayor or county judge or their designated representative within 30 days of notification. The site visit must occur before the Housing Tax Credit can be approved by the Board. The Department will obtain reimbursement from the Applicant for the necessary travel and expenses at rates consistent with the state authorized rate (General Appropriation Act, Article VII, Rider 5) (§42(m)(1));

(iv) Any member of the governing body of a political subdivision who represents the Area containing the Development. If the governing body has single-member districts, then only that member of the governing body for that district will be notified, however if the governing body has at-large districts, then all members of the governing body will be notified;

(v) state representative and state senator who represent the community where the Development is proposed to be located. If the state representative or senator host a community meeting, the Department, if timely notified, will ensure staff are in attendance to provide information regarding the Housing Tax Credit Program; (General Appropriation Act, Article VII, Rider 8(d))

(vi) United States representative who represents the community containing the Development;

(vii) Superintendent of the school district containing the Development;

(viii) Presiding officer of the board of trustees of the school district containing the Development;

(ix) Any Neighborhood Organizations on record with the city or county in which the Development is to be located and whose boundaries contain the proposed Development site or otherwise known to the Applicant or Department and on record with the state or county; and

(x) Advocacy organizations, social service agencies, civil rights organizations, tenant organizations, or others who may have an interest in securing the development of affordable housing that are registered on the Department's email list service.

(C) The elected officials identified in subparagraph (B) of this paragraph will be provided an opportunity to comment on the Application during the Application evaluation process. (§42(m)(1))

(4) The Department shall hold at least three public hearings in different Uniform State Service Regions of the state to receive comment on the submitted Applications and on other issues relating to the Housing Tax Credit Program for competitive Applications under the State Housing Credit Ceiling. (2306.6717(c))

(5) The Department shall make available on the Department's website information regarding the Housing Tax Credit Program including notice of public hearings, meetings, Application Round opening and closing dates, submitted Applications, and Applications approved for underwriting and recommended to the Board, and shall provide that information to locally affected community groups, local and state elected officials, local housing departments, any appropriate newspapers of general or limited circulation that serve the community in which a proposed Development is to be located, nonprofit and for-profit organizations, on-site property managers of occupied Developments that are the subject of Applications for posting in prominent locations at those Developments, and any other interested persons including community groups, who request the information. (2306.6717(b);)

(6) Approximately forty days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will notify each Applicant of the receipt of any opposition received by the Department relating to his or her Development at that time.

(7) Not later than the third working day after the date of completion of each stage of the Application process, including the results of the Application scoring and underwriting phases and the commitment phase, the results will be posted to the Department's web site. (2306.6717(a)(3))

(8) At least thirty days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will:

(A) provide the Application scores to the Board; (2306.6711(a)

(B) if feasible, post to the Department's web site the entire Application, including all supporting documents and exhibits, the Application Log as further described in §50.19(b) of this title, a scoring sheet providing details of the Application score, and any other documents relating to the processing of the Application. (2306.6717(a)(1) and (2))

(9) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if it is received 30 business days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. Comments received after this deadline will not be part of the documentation submitted to the Board. However, a public comment period will be available prior to the Board's decision, at the Board meeting where tax credit commitment decisions will be made.

(10) Not later than the 120th day after the date of the initial issuance of Commitment Notices for housing tax credits, the Department shall provide an Applicant who did not receive a commitment for housing tax credits with an opportunity to meet and discuss with the Department the Application's deficiencies, scoring and underwriting. (2306.6711(e))

(b) Viewing of Pre-Applications and Applications. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Applications, including all exhibits and other supporting materials, except Personal Financial Statements and Social Security numbers, will be made available for public disclosure after the Pre-Application and Application periods close, respectively. The content of Personal Financial Statements may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

(c) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Government Code. (2306.6717(d))

§50.12. Tax-Exempt Bond Developments: Filing of Applications; Applicability of Rules; Supportive Services; Financial Feasibility Evaluation; Satisfaction of Requirements.

(a) Filing of Applications for Tax-Exempt Bond Developments. Applications for a Tax-Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2006 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application not later than 12:00 p.m. on December 29, 2005. Such filing must be accompanied by the Application fee described in §50.20 of this title.

(2) Applicants which receive advance notice of a Program Year 2006 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 and Volume 2 of the Application and the Application fee described in §50.20 of this title prior to the Applicant's bond reservation date as assigned by the TBRB. Any outstanding documentation required under this section must be submitted to the Department at least 60 days prior to the Board meeting at which the decision to issue a Determination Notice would be made unless a waiver is being requested.

(b) Applicability of Rules for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications are subject to all rules in this title, with the only exceptions being the following sections: §50.4 of this title (regarding State Housing Credit Ceiling), §50.7 of this title (regarding Regional Allocation and Set-Asides), §50.8 of this title (regarding Pre-Application), §50.9(d) and (f) of this title (regarding Evaluation Processes for Competitive Applications and Rural Rescue Applications), §50.9(i) of this title (regarding Selection Criteria), §50.10(b) and (c) of this title (regarding Waiting List and Forward Commitments), and §50.14(a) and (b) of this title (regarding Carryover and 10% Test). Such Developments requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in §50.9(h) of this title. Such Developments which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such Developments shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department

determines applicable. Consistency with the local municipality's consolidated plan or similar planning document must be demonstrated in those instances where the city or county has a consolidated plan. Applicants will be required to meet all conditions of the Determination Notice by the time the construction loan is closed unless otherwise specified in the Determination Notice. Applicants must meet the requirements identified in §50.15 of this title. No later than 60 days following closing of the bonds, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan (as further described in the Carryover Allocation Procedures Manual), and evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five hours and the Development architect at Department-approved Fair Housing training relating to design issues for at least five hours. Certifications must not be older than two years. Applications that receive a reservation from the Bond Review Board on or before December 31, 2005 will be required to satisfy the requirements of the 2005 QAP; Applications that receive a reservation from the Bond Review Board on or after January 1, 2006 will be required to satisfy the requirements of the 2006 QAP.

(c) Supportive Services for Tax-Exempt Bond Developments. (2306.254) Tax-Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of special supportive services that would otherwise not be available for the tenants. The provision of these services will be included in the LURA. Acceptable services as described in paragraphs (1) - (3) of this subsection include:

(1) the services must be in at least one of the following categories: child care, transportation, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, organized team sports programs, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities;

(2) any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families, or

(3) any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(d) Financial Feasibility Evaluation for Tax-Exempt Bond Developments. Code §42(m)(2)(D) requires the bond issuer (if other than the Department) to ensure that a Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the Underwriting Rules and Guidelines, §1.32 of this title or request that the Department perform the function. If the issuer underwrites the Development, the Department will, nonetheless, review the underwriting report and may make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this subsection, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined by the Department, as required by Code §42(m)(2)(D), that the Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice are contingent upon approval by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director.

(e) Satisfaction of Requirements for Tax-Exempt Bond Developments. If the Department staff determines that all requirements of this QAP and Rules have been met, the Department will recommend that the Board authorize the issuance of a Determination Notice. The Board, however, may utilize the discretionary factors identified in §50.10(a) of this title in determining if they will authorize the Department to issue a Determination Notice to the Development Owner. The Determination Notice, if authorized by the Board, will confirm that the Development satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

§50.13. Commitment and Determination Notices; Agreement and Election Statement; Documentation Submission Requirements.

(a) Commitment and Determination Notices. If the Board approves an Application, within ten days of approval the Department will:

(1) if the Application is for a commitment from the State Housing Credit Ceiling, issue a Commitment Notice to the Development Owner which shall:

(A) confirm that the Board has approved the Application; and

(B) state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described at §50.16 of this title, and compliance by the Development Owner with the remaining requirements of this chapter and any other terms and conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the commitment by executing the Commitment Notice or Determination Notice, pays the required fee specified in §50.20 of this title, and satisfies any other conditions set forth therein by the Department. A Development Owner may request an extension of the Commitment Notice expiration date by submitting an extension request and associated extension fee as described in §50.20 of this title. Any such extension must be approved by the Board. In no event shall the expiration date of a Commitment Notice be extended beyond the last business day of the applicable calendar year.

(2) if the Application regards a Tax-Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) confirm the Board's determination that the Development satisfies the requirements of this QAP; and

(B) state the Department's commitment to issue IRS Form(s) 8609 to the Development Owner in a specified amount, subject to the requirements set forth at §50.12 of this title and compliance by the Development Owner with all applicable requirements of this title and any other terms and conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §50.20 of this title. The Determination Notice shall also expire unless the Development Owner satisfies any conditions set forth therein by the Department within the applicable time period.

(3) notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable.

(4) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or Rehabilitation exceeds the limitations established from time to time by the Department and the Board, unless the Department staff make a recommendation to the Board based on the need to fulfill the goals of the Housing Tax Credit Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(5) A Commitment or Determination Notice shall not be issued with respect to the Applicant, the Development Owner, the General Contractor, or any Affiliate of the General Contractor that is active in the ownership or Control of one or more other low-income rental housing properties in the state of Texas administered by the Department, or outside the state of Texas, that is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for such property, as described in §60.1 of this title.

(6) The executed Commitment or Determination Notice must be returned to the Department within ten days of the effective date of the Notice.

(b) Agreement and Election Statement. Together with the Development Owner's acceptance of the Carryover Allocation, the Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the Applicable Percentage for the Development as that for the month in which the Carryover Allocation was accepted (or the month the bonds were issued for Tax-Exempt Bond Developments), as provided in the Code, §42(b)(2). Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the Applicable Percentage for a Development, the Carryover Allocation Document must be executed by the Department and the Development Owner within the same month. The Department staff will cooperate with a Development Owner, as possible or reasonable, to assure that the Carryover Allocation Document can be so executed.

(c) Documentation Submission Requirements at Commitment of Funds. No later than the date the Commitment Notice or Determination Notice is executed by the Applicant and returned to the Department with the appropriate Commitment Fee as further described in §50.20(f) of this title, the following documents must also be provided to the Department. Failure to provide these documents may cause the Commitment to be rescinded. For each Applicant all of the following must be provided:

(1) Evidence that the entity has the authority to do business in Texas;

(2) A Certificate of Account Status from the Texas Comptroller of Public Accounts or, if such a Certificate is not available because the entity is newly formed, a statement to such effect; and a Certificate of Organization from the Secretary of State;

(3) Copies of the entity's governing documents, including, but not limited to, its Articles of Incorporation, Articles of Organization, Certificate of Limited Partnership, Bylaws, Regulations and/or Partnership Agreement; and

(4) Evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control and that those Persons signing the Application constitute all Persons required to sign or submit such documents.

§50.14. Carryover; 10% Test; Commencement of Substantial Construction.

(a) Carryover. All Developments which received a Commitment Notice, and will not be placed in service and receive IRS Form 8609 in the year the Commitment Notice was issued, must submit the Carryover documentation to the Department no later than November 1 of the year in which the Commitment Notice is issued. Commitments for credits will be terminated if the Carryover documentation, or an approved extension, has not been received by this deadline. In the event that a Development Owner intends to submit the Carryover documentation in any month preceding November of the year in which the Commitment Notice is issued, in order to fix the Applicable Percentage for the Development in that month, it must be submitted no later than the first Friday in the preceding month. If the financing structure, syndication rate, amount of debt or syndication proceeds are revised at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be reevaluated by the Department. The Carryover Allocation format must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual. All Carryover Allocations will be contingent upon the following, in addition to all other conditions placed upon the Application in the Commitment Notice:

(1) The Development Owner for all New Construction Developments must have purchased the property for the Development.

(2) A current original plat or survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time to time by the Texas Surveyors Association as more fully described in the Carryover Procedures Manual.

(3) For all Developments involving New Construction, evidence of the availability of all necessary utilities/services to the Development site must be provided. Necessary utilities include natural gas (if applicable), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost, and an estimate of any portion of that cost that will be borne by the Development Owner. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the Development property. If utilities are not already accessible (undeveloped areas), then the letter should not be older than three months from the first day of the Application Acceptance Period.

(4) The Department will not execute a Carryover Allocation Agreement with any Owner in Material Noncompliance on October 1, 2006.

(b) 10% Test. No later than six months from the date the Carryover Allocation Document is executed by the Department and the Development Owner, more than 10% of the Development Owner's reasonably expected basis must have been incurred pursuant to §42(h)(1)(E)(i) and (ii) of the Internal Revenue Code and Treasury Regulations, §1.42-6. The evidence to support the satisfaction of this requirement must be submitted to the Department no later than June 30 of the year following the execution of the Carryover Allocation Document in a format prescribed by the Department. At the time of submission of the documentation, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan as further described in the Carryover Allocation Procedures Manual. Evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five hours and the Development architect at Department-approved Fair Housing training relating to design issues for at least five hours on or before the time the 10% Test Documentation is submitted. Certifications must not be older than two years.

(c) Commencement of Substantial Construction. The Development Owner must submit evidence of having commenced and continued substantial construction activities. The evidence must be submitted not later than December 1 of the year after the execution of the Carryover Allocation Document with the possibility of an extension as described in §50.20 of this title.

§50.15. LURA, Cost Certification.

(a) Land Use Restriction Agreement (LURA). The Development Owner must request a LURA from the Department no later than the date specified in §60.1(p)(6), the Department's Compliance Monitoring Policies and Procedures. The Development Owner must date, sign and acknowledge before a notary public the LURA and send the original to the Department for execution. The initial compliance and monitoring fee must be accompanied by a statement, signed by the Owner, indicating the start of the Development's Credit Period and the earliest placed in service date for the Development buildings. After receipt of the signed LURA from the Department, the Development Owner shall then record the LURA, along with any and all exhibits attached thereto, in the real property records of the county where the Development is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department no later than the date that the Cost Certification Documentation is submitted to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Development and/or the Property prior to the recording of the LURA, the Development Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA, which are required by §42(h)(6)(E)(ii) of the Code to remain in effect following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department, or assigns, shall physically inspect the Development for compliance with the Application and the representations, warranties, covenants, agreements and undertakings contained therein. Such inspection will be conducted before the IRS Form 8609 is issued for a building, but it shall be conducted in no event later than the end of the second calendar year following the year the last building in the Development is placed in service. The Development Owner for Tax-Exempt Bond Developments shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA.

(b) Cost Certification. The Cost Certification Procedures Manual sets forth the documentation required for the Department to perform a feasibility analysis in accordance with §42(m)(2)(C)(i)(II), Internal Revenue Code, and determine the final Credit to be allocated to the Development.

(1) To request IRS Forms 8609, Developments must have:

(A) Placed in Service by December 31 of the year the Commitment Notice was issued if a Carryover Allocation was not requested and received; or December 31 of the second year following the year the Carryover Allocation Agreement was executed;

(B) Scheduled a final construction inspection in accordance with §60.1(c) of this title;

(C) Informed the Department of and received written approval for all Development amendments in accordance with §50.17(c) of this title;

(D) Submitted to the Department the LURA in accordance with §50.15(a) of this title;

(E) Paid all applicable Department fees; and

(F) Prepared all Cost Certification documentation in the format prescribed by the Cost Certification Procedures Manual.

(2) Required Cost Certification documentation must be received by the Department no later than January 15 following the year the Credit Period begins. Any Developments issued a Commitment Notice or Determination Notice that fails to submit its Cost Certification documentation by this deadline will be reported to the IRS and the Owner will be required to submit a request for extension consistent with §50.20(l) of this title.

(3) The Department will perform an initial evaluation of the Cost Certification documentation within 45 days from the date of receipt and notify the Owner in a deficiency letter of all additional required documentation. Any deficiency letters issued to the Owner pertaining to the Cost Certification documentation will also be copied to the syndicator. The Department will issue IRS Forms 8609 no later than 90 days from the date that all required documents have been received.

§50.16. Housing Credit Allocations.

(a) In making a commitment of a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Application to determine whether a building is eligible for the credit under the Code, §42. The Development Owner shall bear full responsibility for claiming the credit and assuring that the Development complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Development Owner who receives a Housing Credit Allocation from the Department will qualify for the housing credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Development throughout the affordability period. (2306.6711(b)) Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and as of the date each building in a Development is placed in service. Any Housing Credit Allocation Amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department based upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the department in no way or manner represents or warrants to any Applicant, sponsor, investor, lender or other entity that the Development is, in fact, feasible or viable.

(c) The General Contractor hired by the Development Owner must meet specific criteria as defined by the General Appropriation Act, Article VII, Rider 8(c). A General Contractor hired by a Development Owner or a Development Owner, if the Development Owner serves as General Contractor must demonstrate a history of constructing similar types of housing without the use of federal tax credits. Evidence must be submitted to the Department, in accordance with §50.9(h)(4)(H) of this title, which sufficiently documents that the General Contractor has constructed some housing without the use of Housing Tax Credits. This documentation will be required as a condition of the commitment notice or carryover agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) An allocation will be made in the name of the Development Owner identified in the related Commitment Notice or Determination Notice. If an allocation is made to a member or Affiliate of the ownership entity proposed at the time of Application, the Department will transfer the allocation to the ownership entity as consistent with the intention of the Board when the Development was selected for an award of tax credits. Any other transfer of an allocation will be subject to review and approval by the Department consistent with §50.17(c) of this title. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete current documentation regarding the owner including documentation to show consistency with all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(e) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §50.20 of this title have been received by the Department and with respect to which all applicable requirements, terms and conditions have been met. For Tax-Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Cost Certification documentation requirements will include a certification and inspection report prepared by a Third-Party accredited accessibility inspector to certify that the Development meets all required accessibility standards. IRS Form 8609 will not be issued until the certifications are received by the Department. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for Housing Tax Credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification materials. A separate Housing Credit Allocation shall be made with respect to each building within a Development which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings. The Department may delay the issuance of IRS Form 8609 if any Development violates the representations of the Application.

(f) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum Applicable Percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The Housing Credit Allocation made by the Department shall not exceed the amount necessary to support the extended low-income housing commitment as required by the Code, §42(h)(6)(C)(i).

(g) Development inspections shall be required to show that the Development is built or rehabilitated according to construction threshold criteria and Development characteristics identified at application. At a minimum, all Development inspections must include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Development is placed in service. All such Development inspections shall be performed by the Department or by an independent Third Party inspector acceptable to the Department. The Development Owner shall pay all fees and costs of said inspections as described in §50.20 of this title. For properties receiving financing through TX-USDA-RHS, the Department shall accept the inspections performed by TX-USDA-RHS in lieu of having other Third party Inspections. Details regarding the construction inspection process are set forth in the Department Rule §60.1 of this title (2306.081; General Appropriation Act, Article VII, Rider 8(b)).

(h) After the entire Development is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document and as further outlined in §50.15 of this title, the Development Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. For purposes of this title, and consistent with IRS Notice 88-116, the placed in service date for a new or existing building used as residential rental property is the date on which the building is ready and available for its specifically assigned function and more specifically when the first Unit in the building is certified as being suitable for occupancy in accordance with state and local law and as certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire Development; therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the New Construction or Rehabilitation and, if applicable, a closing statement for the acquisition of the Development as well as for the closing of all interim and permanent financing for the Development. If the Development Owner does not fulfill all representations and commitments made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609, may withhold issuance of the IRS Form 8609s until these representations and commitments are met, and/or may terminate the allocation, if appropriate corrective action is not taken by the Development Owner.

(i) The Board at its sole discretion may allocate credits to a Development Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Development's financial viability.

(j) The Department may, at any time and without additional administrative process, determine to award credits to Developments previously evaluated and awarded credits if it determines that such pre-

viously awarded credits are or may be invalid and the owner was not responsible for such invalidity.

§50.17. Board Reevaluation, Appeals Process; Provision of Information or Challenges Regarding Applications; Amendments; Housing Tax Credit and Ownership Transfers; Sale of Tax Credit Properties; Withdrawals; Cancellations; Alternative Dispute Resolution.

(a) Board Reevaluation. (2306.6731(b)) Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment Notice or Determination Notice for the Development. For the purposes of this subsection, substantial change shall be those items identified in subsection (d)(4) of this section. The Board may revoke any Commitment Notice or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Appeals Process. (2306.6715) An Applicant may appeal decisions made by the Department as follows.

(1) The decisions that may be appealed are identified in subparagraphs (A) - (D) of this paragraph.

(A) a determination regarding the Application's satisfaction of:

(i) Eligibility Requirements;

(ii) Disqualification or debarment criteria;

(iii) Pre-Application or Application Threshold Criteria;

(iv) Underwriting Criteria;

(B) the scoring of the Application under the Application Selection Criteria; and

(C) a recommendation as to the amount of housing tax credits to be allocated to the Application.

(D) Any Department decision that results in termination of an Application.

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant.

(3) An Applicant must file its appeal in writing with the Department not later than the seventh day after the date the Department publishes the results of any stage of the Application evaluation process identified in §50.9 of this title. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application. If the appeal relates to the amount of housing tax credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request.

(4) The Executive Director of the Department shall respond in writing to the appeal not later than the 14th day after the date of receipt of the appeal. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) the seventh day preceding the date of the Board meeting at which the relevant commitment decision is expected to be made; or

(B) the third day preceding the date of the Board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph.

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application and additional documentation filed with the original Application. The Board may not review any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is final.

(6) The Department will post to its web site an appeal filed with the Department or Board and any other document relating to the processing of the appeal. (2306.6717(a)(5))

(c) Provision of Information or Challenges Regarding Applications from Unrelated Entities to the Application. The Department will address information or challenges received from unrelated entities to a 2006 Application, utilizing a preponderance of the evidence standard, in the following manner.

(1) Within seven days of the receipt of the information or challenge, the Department will post all information and challenges received (including any identifying information) to the Department's website.

(2) Within seven days of the receipt of the information or challenge, the Department will notify the Applicant related to the information or challenge. The Applicant will then have seven days to respond to all information and challenges provided to the Department.

(3) Within 14 days of the receipt of the response from the Applicant, the Department will evaluate all information submitted and other relevant documentation related to the investigation. This information may include information requested by the Department relating to this evaluation. The Department will post its determination to its website. Any determinations made by the Department cannot be appealed by any party unrelated to the Applicant.

(d) Amendment of Application Subsequent to Allocation by Board. (2306.6712 and 2306.6717(a)(4))

(1) If a proposed modification would materially alter a Development approved for an allocation of a housing tax credit, or if the Applicant has altered any selection criteria item for which it received points, the Department shall require the Applicant to file a formal, written request for an amendment to the Application.

(2) The Executive Director of the Department shall require the Department staff assigned to underwrite Applications to evaluate the amendment and provide an analysis and written recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with §50.18 of this title shall also provide to the Board an analysis and written recommendation regarding the amendment. For amendments which require Board approval, the amendment request must be received by the Department at least 30 days prior to the Board meeting where the amendment will be considered.

(3) The Board must vote on whether to approve an amendment. The Board by vote may reject an amendment and, if appropriate, rescind a Commitment Notice or terminate the allocation of housing tax credits and reallocate the credits to other Applicants on the Waiting List if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of three percent or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of the Development of at least five percent;

(G) an increase or decrease in the site acreage of greater than 10% from the original site under control and proposed in the Application; and

(H) any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, the Department staff shall consider whether the need for the modification proposed in the amendment was:

(A) reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) preventable by the Applicant.

(6) This section shall be administered in a manner that is consistent with the Code, §42.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's web site.

(8) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants targeted in the original Application, the following procedure will apply. For amendments that involve a reduction in the total number of low-income Units being served, or a reduction in the number of low-income Units at any level of AMGI represented at the time of Application, evidence must be presented to the Department that includes written confirmation from the lender and syndicator that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request, however, any affirmative recommendation to the Board is contingent upon concurrence from the Real Estate Analysis Division that the Unit adjustment (or an alternative Unit adjustment) is necessary for the continued feasibility of the Development. Additionally, if it is determined by the Department that the allocation of credits would not have been made in the year of allocation because the loss of low-income targeting points would have resulted in the Application not receiving an allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (4% or 9%) for 24 months from the time that the amendment is approved.

(e) Housing Tax Credit and Ownership Transfers. (2306.6713) A Development Owner may not transfer an allocation of housing tax credits or ownership of a Development supported with an allocation of housing tax credits to any Person other than an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer.

(1) Transfers will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (potential bankruptcy, removal by a partner, etc.). A Development Owner seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department.

(2) A Development Owner seeking Executive Director approval of a transfer must provide the Department with documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. All transfer requests must disclose the reason for the request. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Housing Tax Credit Program, LURAs; and the sufficiency of the transferee's experience with Developments supported with Housing Credit Allocations. If the viable operation of the Development is deemed to be in jeopardy by the Department, the Department may authorize changes that were not contemplated in the Application.

(3) As it relates to the Credit Cap further described in §50.6(d) of this title, the credit cap will not be applied in the following circumstances:

(A) in cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(B) in cases where the general partner is being replaced if the award of credits was made at least five years prior to the transfer request date.

(f) Sale of Certain Tax Credit Properties. Consistent with §2306.6726, Texas Government Code, not later than two years before the expiration of the Compliance Period, a Development Owner who agreed to provide a right of first refusal under §2306.6725(b)(1), Texas Government Code and who intends to sell the property shall notify the Department of its intent to sell.

(1) The Development Owner shall notify Qualified Nonprofit Organizations and tenant organizations of the opportunity to purchase the Development. The Development Owner may:

(A) during the first six-month period after notifying the Department, negotiate or enter into a purchase agreement only with a Qualified Nonprofit Organization that is also a community housing development organization as defined by the federal home investment partnership program;

(B) during the second six-month period after notifying the Department, negotiate or enter into a purchase agreement with any Qualified Nonprofit Organization or tenant organization; and

(C) during the year before the expiration of the compliance period, negotiate or enter into a purchase agreement with the Department or any Qualified Nonprofit Organization or tenant organization approved by the Department.

(2) Notwithstanding items for which points were received consistent with §50.9(i) of this title, a Development Owner may sell the Development to any purchaser after the expiration of the compli-

ance period if a Qualified Nonprofit Organization or tenant organization does not offer to purchase the Development at the minimum price provided by §42(i)(7), Internal Revenue Code of 1986 (26 U.S.C. Section 42(i)(7)), and the Department declines to purchase the Development.

(g) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation, and making any required statements as to the return of any tax credits allocated to the Development at issue.

(h) Cancellations. The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(1) The Applicant or the Development Owner, or the Development, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Applications process for the Development;

(2) Any statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Development's Application ineligible for funding pursuant to §50.5 of this title if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) The Applicant or the Development Owner or the Development, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

(i) Alternative Dispute Resolution Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title.

§50.18. Compliance Monitoring and Material Noncompliance.

The Code, §42(m)(1)(B)(iii), requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Developments for compliance with the provisions of the Code, §42 and in notifying the IRS of any noncompliance of which the Department becomes aware. Detailed compliance rules and procedures for monitoring are set forth in Department Rule §60.1 of this title.

§50.19. Department Records; Application Log; IRS Filings.

(a) Department Records. At all times during each calendar year the Department shall maintain a record of the following:

(1) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(2) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(3) the cumulative amount of Housing Credit Allocations made during such calendar year; and

(4) the remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Application Log. (2306.6702(a)(3) and 2306.6709) The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) - (9) of this subsection.

(1) the names of the Applicant and all General Partners of the Development Owner, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) the name, physical location, and address of the Development, including the relevant Uniform State Service Region of the state;

(3) the number of Units and the amount of housing tax credits requested for allocation by the Department to the Applicant;

(4) any Set-Aside category under which the Application is filed;

(5) the requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) any decision made by the Department or Board regarding the Application, including the Department's decision regarding whether to underwrite the Application and the Board's decision regarding whether to allocate housing tax credits to the Development;

(7) the names of individuals making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) the amount of housing tax credits allocated to the Development; and

(9) a dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

(c) IRS Filings. The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes Housing Credit Allocations, the original of each completed (as to Part I) IRS Form 8609, a copy of which was mailed or delivered by the Department to a Development Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low-income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of the Carryover Allocation Agreement will be mailed or delivered to the Development Owner by the Department in the year in which the building(s) is placed in service, and thereafter the original will be mailed to the Internal Revenue Service in the time sequence in this subsection. The original of the Carryover Allocation Document will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The original of all executed Agreement and Election Statements shall be filed by the Department with the Department's IRS Form 8610 for the year a Housing

Credit Allocation is made as provided in this section. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§50.20. Program Fees; Refunds; Public Information Requests; Adjustments of Fees and Notification of Fees; Extensions; Penalties.

(a) Timely Payment of Fees. All fees must be paid as stated in this section. Any fees, as further described in this section, that are not timely paid will cause an Applicant to be ineligible to apply for tax credits and additional tax credits and ineligible to submit extension requests, ownership changes and Application amendments. Payments made by check, for which insufficient funds are available, may cause the Application, commitment or allocation to be terminated.

(b) Pre-Application Fee. Each Applicant that submits a Pre-Application shall submit to the Department, along with such Pre-Application, a non refundable Pre-Application fee, in the amount of $10 per Unit. Units for the calculation of the Pre-Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-Applications without the specified Pre-Application Fee in the form of a check will not be accepted. Pre-Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Pre-Application fee. (General Appropriation Act, Article VII, Rider 7; 2306.6716(d))

(c) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a Pre-Application which met Pre-Application Threshold and for which a Pre-Application fee was paid, the Application fee will be $20 per Unit. For Applicants not having submitted a Pre-Application, the Application fee will be $30 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a check will not be accepted. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Application fee. (General Appropriation Act, Article VII, Rider 7; 2306.6716(d))

(d) Refunds of Pre-Application or Application Fees. (2306.6716(c)) The Department shall refund the balance of any fees collected for a Pre-Application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 20% of the review, the site visit will constitute 20% of the review, Eligibility and Selection review will constitute 20%, and Threshold review will constitute 20% of the review, and underwriting review will constitute 20%. The Department must provide the refund to the Applicant not later than the 30th day after the date the last official action is taken with respect to the Application.

(e) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent external underwriter in accordance with §50.9(d)(6) of this title if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the commitment fee established in subsection (f) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Development Owner.

(f) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the commitment notice, a non-refundable commitment fee equal to 5% of the annual Housing Credit Allocation amount. The commitment fee shall be paid by check.

(g) Compliance Monitoring Fee. Upon receipt of the cost certification, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax credit unit. The fee will be collected, retroactively if applicable, beginning with the first year of the credit period. The invoice must be paid prior to the issuance of form 8609. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the beginning month of the compliance period.

(h) Building Inspection Fee. The Building Inspection Fee must be paid at the time the Commitment Fee is paid. The Building Inspection Fee for all Developments is $750. Inspection fees in excess of $750 may be charged to the Development Owner not to exceed an additional $250 per Development. Developments receiving financing through TX-USDA-RHS that will not have construction inspections performed through the Department will be exempt from the payment of an inspection fee.

(i) Tax-Exempt Bond Credit Increase Request Fee. As further described in §50.12 of this title, requests for increases to the credit amounts to be issued on IRS Forms 8609 for Tax-Exempt Bond Developments must be submitted with a request fee equal to one percent of the first year's credit amount.

(j) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Government Code, Chapter 552. The Department uses the guidelines promulgated by The Texas Building and Procurement Commission to determine the cost of copying, and other costs of production.

(k) Periodic Adjustment of Fees by the Department and Notification of Fees. (2306.6716(b)) All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish each year an updated schedule of Application fees that specifies the amount to be charged at each stage of the Application process. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

(l) Extension and Amendment Requests. All extension requests relating to the Commitment Notice, Carryover, Documentation for 10% Test, Substantial Construction Commencement, Placed in Service or Cost Certification requirements and amendment requests shall be submitted to the Department in writing and be accompanied by a non-refundable extension fee in the form of a check in the amount of $2,500. Such requests must be submitted to the Department no later than the date for which an extension is being requested. For extensions which require Board approval, the extension request must be received by the Department at least 15 business days prior to the Board meeting where the extension will be considered. The extension request shall specify a requested extension date and the reason why such an extension is required. Carryover extension requests shall not request an extended deadline later than December 1st of the year the Commitment Notice was issued. The Department, in its sole discretion, may consider and grant such extension requests for all items. If an extension is required at Cost Certification, the fee of $2,500 must be received by the Department to qualify for issuance of Forms 8609.

Amendment requests must be submitted consistent with §50.17(d) of this title. The Board may waive related fees for good cause.

(m) Penalties. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of 8609's. For non tax-exempt bond funded developments, a penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of form 8609's if the tax credits are not returned, and 8609's issued, within 60 days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with Section 42, Internal Revenue Code.

§50.21. Manner and Place of Filing All Required Documentation.

(a) All Applications, letters, documents, or other papers filed with the Department must be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All notices, information, correspondence and other communications under this title shall be deemed to be duly given if delivered or sent and effective in accordance with this subsection. Such correspondence must reference that the subject matter is pursuant to the Tax Credit Program and must be addressed to the Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941 or for hand delivery or courier to 507 Sabine, Suite 400, Austin, Texas 78701 or more current address of the Department as released on the Department's website. Every such correspondence required or contemplated by this title to be given, delivered or sent by any party may be delivered in person or may be sent by courier, telecopy, express mail, telex, telegraph or postage prepaid certified or registered air mail (or its equivalent under the laws of the country where mailed), addressed to the party for whom it is intended, at the address specified in this subsection. Regardless of method of delivery, documents must be received by the Department no later than 5:00 p.m. for the given deadline date. Notice by courier, express mail, certified mail, or registered mail will be considered received on the date it is officially recorded as delivered by return receipt or equivalent. Notice by telex or telegraph will be deemed given at the time it is recorded by the carrier in the ordinary course of business as having been delivered, but in any event not later than one business day after dispatch. Notice not given in writing will be effective only if acknowledged in writing by a duly authorized officer of the Department.

(c) If required by the Department, Development Owners must comply with all requirements to use the Department's web site to provide necessary data to the Department.

§50.22. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules if the Board finds that waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.

(b) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Government Code, Chapter 2001.

§50.23. Deadlines for Allocation of Housing Tax Credits. (2306.6724)

(a) Not later than September 30 of each year, the Department shall prepare and submit to the Board for adoption the draft QAP required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the Housing Tax Credit program.

(b) The Board shall adopt and submit to the Governor the QAP not later than November 15 of each year.

(c) The Governor shall approve, reject, or modify and approve the QAP not later than December 1 of each year. (2306.67022)(§42(m)(1))

(d) The Board shall annually adopt a manual, corresponding to the QAP, to provide information on how to apply for housing tax credits.

(e) Applications for Housing Tax Credits to be issued a Commitment Notice during the Application Round in a calendar year must be submitted to the Department not later than March 1.

(f) The Board shall review the recommendations of Department staff regarding Applications and shall issue a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30.

(g) The Board shall approve final commitments for allocations of housing tax credits each year in accordance with the Qualified Allocation Plan not later than July 31, unless unforeseen circumstances prohibit action by that date. In any event, the Board shall approve final commitments for allocations of housing tax credits each year in accordance with the Qualified Allocation Plan not later than September 30. Department staff will subsequently issue Commitment Notices based on the Board's approval. Final commitments may be conditioned on various factors approved by the Board, including resolution of contested matters in litigation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506096
Edwina Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 11, 2006
Proposal publication date: September 2, 2005
For further information, please call: (512) 475-4595

TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING

SUBCHAPTER D. DRUG TESTING

DIVISION 3. PROVISIONS FOR HORSES

16 TAC §319.363

The Texas Racing Commission adopts new §319.363, relating to testing for total carbon dioxide without changes to the proposed text as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7347) and will not be republished.

The new rule is adopted to prevent the use of bicarbonate-containing or other alkalinizing substances that neutralize lactic acid,

which causes fatigue, in a race horse. The use of bicarbonate-containing or other alkalinizing substances can be detected by testing the total carbon dioxide level in the horse's serum. The intent of the use of bicarbonate-containing or other alkalinizing substances is to unlawfully influence the outcome of a race by altering or manipulating the performance of the horse by negating the effect of lactic acid produced, stopping the decrease in pH, and altering the general body metabolism.

The new rule prohibits the administration of any bicarbonate-containing or other alkalinizing substance which causes an excess level of total carbon dioxide at or above 39 millimoles per liter in a race horse serum specimen.

No comments were received regarding the adoption of this new rule.

The new rule is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, §3.07, which authorizes the Commission to make rules relating to laboratory charges for medication or drug testing, and §3.16, which authorizes the Commission to make rules prohibiting the unlawful influence on the outcome of a race and to implement testing programs.

The new rule implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 22, 2005.

TRD-200506097
Elizabeth G. Goins
General Counsel
Texas Racing Commission
Effective date: January 11, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 833-6699

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER F. MOTOR VEHICLE SALES TAX

34 TAC §3.63

The Comptroller of Public Accounts adopts the repeal of existing §3.63, concerning motor vehicles purchased, leased or operated by diplomatic officials, without changes to the proposal as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7380).

The existing §3.63 is being repealed so that the content can be updated in a new §3.63 to reflect changes made by the United States Department of State to the procedure and policy for authorization of tax exemption on vehicles purchased by diplomatic missions and their members. The adopted new section will incorporate those changes.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The repeal of the existing section and adoption of a new section implements United States Department of State, Office of Foreign Missions tax exemption procedure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505964
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: January 9, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 475-0387

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34 TAC §3.63

The Comptroller of Public Accounts adopts new §3.63, concerning foreign diplomatic officials, without changes to the proposed text as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7380).

This section implements changes made by the United States Department of State, Office of Foreign Missions to the procedure and policy for authorization of tax exemption.

No comments were received regarding adoption of the new section.

The new section is adopted under Tax Code, §111.002 and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

This new section implements United States Department of State, Office of Foreign Missions tax exemption procedure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2005.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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Proposal publication date: November 11, 2005
For further information, please call: (512) 475-0387

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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 31. EMPLOYMENT AFTER RETIREMENT

SUBCHAPTER D. EMPLOYER PENSION SURCHARGE

34 TAC §31.41

The Board of Trustees (Board) Teacher Retirement System of Texas (TRS) adopts on a permanent basis new §31.41, concerning the administration of an employer pension surcharge related to employment after retirement. The amendments to §31.41 are adopted with changes to the proposed text as published in the September 30, 2005, issue of the *Texas Register* (30 TexReg 6254).

The Board adopts the new rule so TRS can implement Senate Bill 1691, 79th Legislature, Regular Session (2005) (SB 1691) (to be codified at §825.4092, Government Code), which, with certain exceptions, requires employers who report to TRS the employment of a retiree to pay a pension surcharge. The new law became effective September 1, 2005. In implementing SB 1691, the new rule will provide guidance regarding the basis for computing the surcharge as well as guidance on which reported retirees the surcharge must be paid. The new section also provides for payment of the surcharge on reported retirees concurrently employed by more than one employer or subsequently employed by more than one employer during the same school year. In accordance with the legislative enactment, the Board separately adopted by resolution the pension surcharge amount, which is an amount equal to the sum of the combined member and state contributions (currently 12.4% of salary).

Clarifying when payment is triggered, the new section applies the surcharge only to a reported retiree working in a TRS-covered position. The new rule applies the same criteria used to determine eligibility for TRS membership to the determination of whether a retiree is working in a TRS-covered position for purposes of the surcharge. The new section also provides that an employer owes the surcharge on a retiree who is working in a TRS-covered position for a third-party entity but who is considered an employee of the employer.

TRS staff took actions with regard to the employer pension surcharge pursuant to the emergency disasters, emergency conditions, and threat thereof declared by the Governor of Texas because of Hurricane Katrina. The governor's emergency disaster proclamation was issued to be effective September 1, 2005 and was renewed effective October 1, 2005. In response to the declared emergency, the governor's office requested emergency relief from the imposition of the employer pension surcharge on Texas school districts that needed to hire TRS retirees to respond to the influx of evacuees from states impacted by Hurricane Katrina. Accordingly, the Board adopts the new rule with changes to the proposed text as published September 30, 2005 to respond to emergency disaster conditions created by Hurricane Katrina and to clarify the definition of "substitute" to be used in applying the surcharge. As determined by legal counsel, these changes are a logical outgrowth of the proposed rule as published and do not materially alter the issues raised in it. The changes to the proposed rule do not entail new subjects of application or affect any new persons besides those previously given notice.

TRS received no public comments on proposed new section as published September 30, 2005.

Statutory Authority: §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system; Tex. Gov. Proclamation No. 41-3018 (signed Sept. 1, 2005), 30 TexReg 5881 (2005), Governor Perry's initial disaster proclamation regarding Hurricane Katrina, and Tex. Gov. Proclamation No. 41-3025 (signed Oct. 3, 2005), 30 TexReg 6842 (2005), the governor's renewal of the disaster proclamation for Hurricane Katrina, both of which require adoption of amended rule §31.41 so that TRS may provide clear and consistent guidance to affected retirees and reporting entities regarding the limited exception being granted on the imposition of the employer surcharge in response to the governor's proclamations and emergency relief request; §418.012, Government Code, which provides that the above-referenced gubernatorial proclamations have the force and effect of state law.

Cross-reference to Statute: §30 of SB 1691, which establishes new §825.4092, Government Code, relating to employer contributions for employed retirees.

§31.41. Return to Work Employer Pension Surcharge.

(a) For each report month a retiree is working in a TRS-covered position and reported on the Employment of Retired Members Report, the employer that reports the retiree shall pay to the Teacher Retirement System of Texas (TRS) a surcharge based on the retiree's salary. For purposes of this section, the employer is the reporting entity that reports the employment of the retiree and the criteria used to determine if the retiree is working in a TRS-covered position are the same as the criteria for determining employment eligible for TRS membership, except that a retiree reported as a substitute must meet the requirements of §31.1(b) of this title for the surcharge not to apply. For the 2005-2006 school year only, a retiree who retired before September 1, 2005 and is employed for a period of more than 4 1/2 months due to the enrollment of students displaced by Hurricane Katrina may be considered a temporary employee whose employment is not subject to the surcharge under this section.

(b) The surcharge amount that must be paid by the employer for each retiree working in a TRS-covered position is an amount that is derived by applying a percentage to the retiree's salary. The percentage applied to the retiree's salary is an amount set by the Board of Trustees and is based on member contribution rate and the state pension contribution rate.

(c) The surcharge is due from each employer that reports a retiree as working as described in this section on or after September 1, 2005, beginning with the report month for September 2005.

(d) The surcharge is not owed by the employer for any retiree reported by that employer on the Employment of Retired Members Report for the report month of January 2005.

(e) The surcharge is not owed by the employer for a retiree that is reported as working under the exception for Substitute Service as provided in §31.13 of this title unless that retiree combines Substitute Service under §31.13 of this title with other TRS-covered employment in the same calendar month. For each calendar month that the retiree combines substitute service and other TRS-covered employment, the surcharge is owed by the employer that reports the retiree on all compensation earned by the retiree, including compensation for the substitute service.

(f) The surcharge is owed by the employer on any retiree who is working for a third party entity but serving in a TRS-covered position and who is considered an employee of that employer under §824.601(d) of the Government Code.

(g) If a retiree is employed concurrently in more than one position that is not eligible for TRS membership, the surcharge is owed if the combined employment is eligible for membership under §25.6 of this title. If the employment is with more than one employer, the surcharge is owed by each employer.

(h) If a retiree is employed concurrently in more than one position and one of the positions is eligible for TRS membership and one is not, the surcharge is owed on the combined employment. If the employment is with more than one employer, the surcharge is owed by each employer.

(i) If a retiree is employed in a position eligible for TRS membership, the surcharge is owed by each employer on all subsequent employment with a TRS-covered employer for the same school year.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2005.

TRD-200506045
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
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For further information, please call: (512) 542-6438

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CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS
SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §41.4

The Board of Trustees (Board) Teacher Retirement System of Texas (TRS) adopts on a permanent basis new §41.4 concerning the administration of an employer health benefit surcharge related to employment after retirement. The amendments to §41.4 are adopted with changes to the proposed text as published in the September 30, 2005, issue of the *Texas Register* (30 TexReg 6255).

The Board adopts the new rule so TRS can implement Senate Bill 1691, 79th Legislature, Regular Session (2005) (SB 1691) (to be codified at §825.4092, Government Code and §1575.204, Insurance Code), which, with certain exceptions, requires employers who report to TRS the employment of a retiree enrolled in the retiree health benefits program (TRS-Care) to pay a health benefit surcharge. The new law became effective September 1, 2005. In implementing SB 1691, the new rule will provide guidance regarding the basis for computing the surcharge as well as guidance on which reported retirees the surcharge must be paid. The new section also provides for payment of the surcharge on reported retirees concurrently employed by more than one employer or subsequently employed by more than one employer during the same school year. In accordance with the legislative enactment, the Board separately adopted by resolution a table setting forth the monthly dollar amounts for the surcharge, as shown in the table titled "TRS-Care Employer Surcharge Amounts - Return to Work Effective September 1, 2005," which is incorporated into this preamble and may be viewed by accessing TRS's Web site at www.trs.state.tx.us/Reporting_Officials/surcharge_amts.pdf or by requesting a copy from Ronnie Jung, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701.

Clarifying when payment is triggered, the new section applies the surcharge only to a reported retiree enrolled in TRS-Care and working in a TRS-covered position. The new rule applies the same criteria used to determine eligibility for TRS membership to the determination of whether a retiree is working in a TRS-covered position for purposes of the surcharge. The new rule also requires the retiree to provide the employer updated information about changes to the retiree's TRS-Care coverage. Further, the new section provides that an employer owes the surcharge on a retiree enrolled in TRS-Care who is working in a TRS-covered position for a third-party entity but who is considered an employee of the employer.

TRS staff took actions with regard to the employer health benefit surcharge pursuant to the emergency disasters, emergency conditions, and threat thereof declared by the Governor of Texas because of Hurricane Katrina. The governor's emergency disaster proclamation was issued to be effective September 1, 2005 and was renewed effective October 1, 2005. In response to the declared emergency, the governor's office requested emergency relief from the imposition of the employer health benefit surcharge on Texas school districts that needed to hire TRS retirees to respond to the influx of evacuees from states impacted by Hurricane Katrina. Accordingly, the Board adopts the new rule with changes to the proposed text as published September 30, 2005 to respond to emergency disaster conditions created by Hurricane Katrina and to clarify the definition of "substitute" to be used in applying the surcharge. As determined by legal counsel, these changes are a logical outgrowth of the proposed rule as published and do not materially alter the issues raised in it. The changes to the proposed rule do not entail new subjects of application or affect any new persons besides those previously given notice.

TRS received no public comments on proposed new §41.4 as published September 30, 2005.

Statutory Authority: §1575.052, Insurance Code, which authorizes the Board to adopt rules it considers necessary to implement and administer the retiree health benefits program and associated fund; Tex. Gov. Proclamation No. 41-3018 (signed Sept. 1, 2005), 30 TexReg 5881 (2005), Governor Perry's initial disaster proclamation regarding Hurricane Katrina, and Tex. Gov. Proclamation No. 41-3025 (signed Oct. 3, 2005), 30 TexReg 6842 (2005), the governor's renewal of the disaster proclamation for Hurricane Katrina, both of which require adoption of amended rule §41.4 so that TRS may provide clear and consistent guidance to affected retirees and reporting entities regarding the limited exception being granted on the imposition of the employer surcharge in response to the governor's proclamations and emergency relief request; §418.012, Government Code, which provides that the above-referenced gubernatorial proclamations have the force and effect of state law.

Cross-reference to Statute: §30 of SB 1691, which establishes new §825.4092, Government Code, relating to employer contri-

butions for employed retirees; §42 of SB 1691, which amends §1575.204, Insurance Code, relating to public school contribution under the retiree health benefits program.

§41.4. Employer Health Benefit Surcharge.

(a) When used in this section, the term "employer" has the meaning given in §821.001(7), Government Code.

(b) A retiree who is enrolled in the health benefits program ("TRS-Care") provided pursuant to the Texas Public School Retired Employees Group Benefits Act, is working in a TRS-covered position, and is reported on the Employment of Retired Members Report to the Teacher Retirement System of Texas ("TRS") shall submit the TRS-Care Employer Health Benefit Surcharge Information Form, promulgated by TRS, to the employer, providing details of the retiree's TRS-Care coverage tier, years of service credit, and category of enrollment, as well as the identification of all employers of the retiree and all employers of any other retiree enrolled under the same account identification number, as required by the form. The criteria used to determine if the retiree is working in a TRS-covered position are the same as the criteria for determining employment eligible for TRS membership, except that a retiree reported as a substitute must meet the requirements of §31.1(b) of this title for the surcharge not to apply.

(c) The retiree must submit to the employer an updated Employer Health Benefit Surcharge form when changes occur in coverage or the employment status of any retiree or other individual enrolled under the same account identification number.

(d) For each report month a retiree is enrolled in TRS-Care, is working in a TRS-covered position, and is reported on the Employment of Retired Members Report, the employer that reports the retiree shall, using the information provided by the retiree to the employer on the Employer Health Benefit Surcharge form, pay monthly to the Retired School Employees Group Insurance Fund (the "Fund") a surcharge amount that is derived by taking the difference, if any, between:

(1) the monthly full cost, as set by the trustee, for all individuals (including a spouse and children, if any) enrolled under the same account identification number; and

(2) the monthly total premium, as set by the trustee, for all individuals (including a spouse and children, if any) enrolled under the same account identification number.

(e) The surcharge is also owed by the employer on any retiree who is enrolled in TRS-Care, is working for a third party entity but is serving in a TRS-covered position, and who is considered an employee of that employer under §824.601(d) of the Government Code.

(f) The surcharge under subsection (d) of this section is due from each employer that reports a retiree as working in a TRS-covered position on or after September 1, 2005, beginning with the report month for September 2005.

(g) The surcharge under subsection (d) of this section is not owed:

(1) by an employer for any retiree reported by that employer on the Employment of Retired Members Report for the report month of January 2005;

(2) by an employer for any retiree reported by a second employer on the Employment of Retired Members Report for the report month of January 2005, if both employers are school districts that consolidate into a consolidated school district on or before September 1, 2005; or

(3) by an employer for a retiree reported as working under the exception for Substitute Service as provided in §31.13 of this title unless that retiree combines Substitute Service under §31.13 of this title with other TRS-covered employment in the same calendar month. For each calendar month that the retiree combines substitute service and other TRS-covered employment, the surcharge is owed by the employer that reports the retiree on all compensation earned by the retiree, including compensation for the substitute service.

(h) An employer who reports to TRS the employment of a retiree who is enrolled in TRS-Care and is working in a TRS-covered position shall inform TRS as soon as possible in writing of the name, address, and telephone number of any other employer that employs the retiree or any other retiree who is also enrolled under the same account identification number.

(i) If more than one employer reports the employment of a retiree who is enrolled in TRS-Care to TRS during any part of a month, the surcharge under subsection (d) of this section required to be paid into the Fund by each reporting employer for that month is the total amount of the surcharge due that month divided by the number of reporting employers. The pro rata share owed by each employer is not based on the number of hours respectively worked each week by the retiree for each employer, nor is it based on the number of days respectively worked during the month by the retiree for each employer.

(j) If a retiree who is enrolled in TRS-Care is employed concurrently in more than one position that is not eligible for TRS membership, the surcharge is owed if the combined employment is eligible for membership under §25.6 of this title. If the employment is with more than one employer, the surcharge will be paid according to subsection (i) of this section by each employer.

(k) If a retiree who is enrolled in TRS-Care is employed concurrently in more than one position and one of the positions is eligible for TRS membership and one is not, the surcharge is owed on the combined employment. If the employment is with more than one employer, the surcharge will be paid according to subsection (i) of this section by each employer.

(l) If a retiree who is enrolled in TRS-Care is employed in a position eligible for TRS membership, the surcharge will be paid according to subsection (i) of this section by each employer on all subsequent employment with a TRS-covered employer for the same school year.

(m) Notwithstanding the above, for the 2005-2006 school year only, a retiree

(1) who retired before September 1, 2005,

(2) who is enrolled in TRS-Care, and

(3) who is employed for a period of more than four and one-half months due to the enrollment of students displaced by Hurricane Katrina may be considered a temporary employee whose employment is not subject to the surcharge under this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2005.

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Ronnie G. Jung
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Teacher Retirement System of Texas
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For further information, please call: (512) 542-6438

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PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 71. CREDITABLE SERVICE

34 TAC §§71.1, 71.2, 71.27, 71.31

The Employees Retirement System of Texas (ERS) adopts amendments to Title 34, Chapter 71, Texas Administrative Code. The amendments to §§71.1, 71.2 and 71.31 concern changes in the membership waiting period; the amendments to §71.27 concern certain service solely to establish retirement eligibility. The amendments are adopted without changes to the proposed text as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7383). The text of the adopted rules will not be republished.

The amended sections are adopted to comply with and conform to Senate Bill 1176, 79th Legislature, Regular Session.

Section 71.1 is adopted to delete subsection (e). This is a technical change needed to update and clarify the rules regarding membership waiting period service. Subsection (e) is currently delineated under §71.2(g) and will now be delineated under §71.2(f).

Section 71.2, subsection (a) is adopted to remove a reference to the expiration of the 90-day membership waiting period as provided by Texas Government Code, §812.003, as amended by Senate Bill 1176, which makes the 90-day membership waiting period permanent. Section 71.2 is also adopted to deleted subsection (f), thereby removing a provision that provided for the establishment of waiting period service between the 91st day of employment until contributions begin on the first day of the following month as membership service not previously established, as provided by Texas Government Code, §813.514, as amended by Senate Bill 1176. Section 813.514 was amended to remove the three-month limit on the credit purchase option for service during the membership waiting period; therefore, service earned between the 91st day of employment and the date contributions begin may be established as provided in §71.31 of this chapter.

Subsection 71.27(a) is adopted to update the rules by deleting language pursuant to Senate Bill 1176, which repealed Texas Government Code, §814.202(d), regarding the use of service credit in the Optional Retirement Program under TRS to meet the requirement of 10 years of service credit in ERS for a disability retirement annuity. Subsections 71.27(a) and (b) are also adopted to update the rules pursuant to Senate Bill 1176, which repealed Texas Government Code, §814.1042, effective January 1, 2006, regarding the establishment of service with certain governmental employers. Subsection (b) is also adopted to provide that service documented with the system prior to January 1, 2006, will be considered for the sole purpose of determining eligibility to receive a service retirement only under the Rule of 80.

Section 71.31 is adopted to update and clarify the rules pursuant to Texas Government Code, §813.514, as amended by Senate Bill 1176, which removed the three month restriction on the credit purchase option for service during the waiting period. Employees who do not begin state employment on the first day of a calendar month experience four months of waiting period service. This amendment will allow those affected employees to purchase the fourth month under the credit purchase option. This section is further adopted to clarify that a retirement contribution must have been made as provided under §813.201 before establishing service under this section. This change is needed because a credit purchase option cost estimate cannot be made until a retirement contribution has been made to the System.

No comments were received on these proposed rule amendments.

The amendments to Chapter 71 are adopted under the following Texas Government Code provisions: §815.102, which authorizes the board of trustees (board) to adopt rules for eligibility of membership and the administration of the funds of the retirement system; and §813.514, which authorizes the board to adopt rules to administer the credit purchase option, including rules that impose restrictions on the application of the statutes as necessary to cost-effectively administer the statute. These rules affect Title 8, Subtitle B of the Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paula A. Jones
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Employees Retirement System of Texas
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For further information, please call: (512) 867-7421

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34 TAC §71.21

The Employees Retirement System of Texas (ERS) adopts a repeal to Title 34, Chapter 71, Texas Administrative Code. The repeal of §71.21 concerns the transfer of certain state employees from the Teacher Retirement System of Texas (TRS) to ERS. The repeal is adopted without changes as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7385). The text of the repealed rule will not be published.

Section 71.21 is repealed to update the rules regarding the transfer of certain state employees from TRS to ERS under a retirement incentive for the employee class pursuant to Acts of the 73rd Legislature. The repeal is needed because provisions of the retirement incentive expired on September 1, 1995 and are no longer applicable. The sections of §71.21 that remain applicable are already contained in §71.19.

No comments were received on the proposed repeal.

The repeal of §71.21 is adopted under Texas Government Code, §815.102, which authorizes the board of trustees (board) to adopt rules for the administration of the funds of the retirement system. This repeal affects Title 8, Subtitle B of the Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paula A. Jones
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CHAPTER 73. BENEFITS

34 TAC §73.19

The Employees Retirement System of Texas (ERS) adopts a repeal to Title 34, Chapter 73, Texas Administrative Code. The repeal of §73.19 concerns the limitation of disability claims. The repeal is adopted without changes as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7385). The text of the repealed rule will not be published.

Section 73.19 is repealed to update the rules and remove sections that only duplicate what is already contained in the relevant statute. The provisions of §73.19 are delineated under Texas Government Code, §814.201, and an administrative rule is not needed.

No comments were received on the proposed repeal.

The repeal of §73.19 is adopted under Texas Government Code, §815.102, which authorizes the board of trustees to adopt rules for the administration of the funds of the retirement system. This repeal affects Title 8, Subtitle B of the Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paula A. Jones
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CHAPTER 77. JUDICIAL RETIREMENT

34 TAC §§77.15, 77.21, 77.23

The Employees Retirement System of Texas (ERS) adopts a rule amendment, an amended table of factors, and a new rule under Title 34, Chapter 77, Texas Administrative Code. The amendment to §77.15 is a conforming change to correspond with the proposed new rule §77.23. An amended table of factors relating to §77.21(d) [Figure: 34 TAC §77.21(d)], is adopted to replace the existing table and will be used to determine the cost for members of the Judicial Retirement System of Texas Plan Two (JRS II) to purchase membership service credit under the credit purchase option authorized by Texas Government Code, §838.108, as amended by Senate Bill 1176, 79th Legislature, Regular Session. New rule §77.23 concerns penalty interest on the purchase of service in excess of 20 years as established by House Bill 1114, 79th Legislature, Regular Session. The amended rule, the amended table and the new rule are adopted without changes to the proposed text and proposed table as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7386). The text of the adopted rules and table will not be republished.

Section 77.15 is adopted to reference proposed new rule §77.23 to clarify that, consistent with the existing rule, penalty interest applies only to JRS II in purchasing service in excess of 20 years.

Section 77.23 is adopted to clarify the purchase of service in excess of 20 years and to provide for a penalty interest rate of ten percent for those JRS II members who do not establish the service credit before the first anniversary of the date of first eligibility. This change is consistent with current rules and practice with regard to service credit not previously established and is required to cost-effectively administer the program.

An amended table of factors relating to §77.21(d) is adopted to allow a member of JRS II only to purchase additional service credit under the credit purchase option to retire or to become eligible to retire with 20 years of service by paying the System the actuarial present value of the additional benefit attributable to the additional service credit as specified in Texas Government Code, §838.108(b). The table of factors represents the actuarial cost factors to purchase the additional service credit. This table replaces the existing table and is needed to comply with and conform to Senate Bill 1176, 79th Legislature, Regular Session, in order for ERS to be able to administer the service purchase properly. The text of rule §77.21 is not amended.

No comments were received on the proposed rule amendment, the proposed new table or the proposed new rule.

The amendment to §77.15 and new §77.23 are adopted under Texas Government Code, §833.1035, §835.002, §838.1035, and §840.002, which authorizes the board to adopt rules necessary for the administration of the Judicial Retirement System of Texas Plan One and Plan Two, respectively.

The table of factors is adopted under Texas Government Code, §838.108, which authorizes the board to adopt rules to administer the credit purchase option, including rules that impose restrictions on the application of the statutes as necessary to cost-effectively administer the statute; and §840.002, which authorizes the board to adopt rules it considers necessary for the administration of the Judicial Retirement System Plan Two. These rules affect Title 8, Subtitles D and E of the Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200506057

Paula A. Jones
General Counsel
Employees Retirement System of Texas
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For further information, please call: (512) 867-7421

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CHAPTER 87. DEFERRED COMPENSATION

34 TAC §§87.1, 87.3, 87.5, 87.17, 87.33

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code §§87.1, 87.3, 87.5, 87.17, and 87.33, concerning the Deferred Compensation Plan, without changes to the proposed text as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7389). The text of the rules will not be republished.

Sections 87.1 through 87.33 are adopted to update the plan rules, to clarify plan requirements, and to comply with and conform to state and federal law and administrative requirements.

Section 87.1, concerning Definitions, is adopted to add and revise certain definitions due to changes in state regulations. State regulations changed in 2005 to allow community colleges and junior colleges to participate in the Texa$aver 457 Plan.

Sections 87.3, 87.5 and 87.33, concerning Administrative and Miscellaneous Provisions, Participation by Employees, and The Economic Growth and Tax Relief and Reconciliation Act, are adopted to adjust the annual deferral limit to $15,000 for 2006, per federal law.

Section 87.5(h)(9) is adopted to adjust the over age 50 catch-up limits to $5,000 for 2006, per federal law. Other changes in §87.5 include amendments to post severance compensation now allowed by Internal Revenue Code (IRC) §415 regulations, and defines the conditions under which this compensation can be deferred.

Section 87.17, concerning Distributions, is adopted to include amendments resulting from IRC §415 regulations and also amendments to the loan section. Section 87.17 is also adopted to include a clarification regarding the IRC §402(f) safe harbor notice, and to provide that the notice may be delivered electronically or in writing.

Section 87.33, concerning The Economic Growth and Tax Relief and Reconciliation Act, is adopted to include a clarification regarding the delivery of the IRC §402(f) safe harbor notice.

ERS received no comments regarding these proposed rule amendments.

The amendments are adopted under Government Code, §609.508, which provides authorization for the ERS Board of Trustees to adopt rules necessary to administer the deferred compensation plan.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paula A. Jones
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PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.8

The Texas County and District Retirement System adopts an amendment to §103.8, concerning the manner of paying retirement annuities with respect to retirees whose benefits are subject to the limitations of Section 415(b) of the Internal Revenue Code. This amended rule is adopted without changes to the proposed text as published in the October 28, 2005, issue of the *Texas Register* (30 TexReg 7009).

The amendment sets forth the method of distribution to be used depending on whether the annuitant is a participant in the Texas County and District Retirement System Qualified Replacement Benefit Arrangement.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Government Code §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200506042
Tom Harrison
Deputy Director and General Counsel
Texas County and District Retirement System
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For further information, please call: (512) 328-8889

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CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.15

The Texas County and District Retirement System adopts new rule §107.15, concerning the resumption of enrollment of new employees in the retirement system by a subdivision that previously had elected to discontinue enrollment of its new employees. The new rule is adopted without changes to the proposed text as published in the October 28, 2005, issue of the *Texas Register* (34 TexReg 7010).

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2005.

TRD-200506043
Tom Harrison
Deputy Director and General Counsel
Texas County and District Retirement System
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For further information, please call: (512) 328-8889

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CHAPTER 111. TERMINATION OF PARTICIPATION: SUBDIVISIONS

34 TAC §§111.1 - 111.4

The Texas County and District Retirement System adopts new Chapter 111, consisting of new §§111.1 - 111.4, concerning the definitions and notice procedures for the termination of a subdivision's participation in TCDRS. The new rules are adopted without changes to the proposed text as published in the October 28, 2005, issue of the *Texas Register* (30 TexReg 7010).

The new chapter causes the rule to conform to the statutory change made by §6, of HB 633 as passed during the 2005 regular session of the 79th Legislature, which provides subdivisions the option to terminate participation in TCDRS and the authority to adopt rules to implement this termination option.

No comments were received regarding adoption of the new rules.

The new rules are adopted under the Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system; and are adopted in anticipation of the authority granted in §842.051(c), Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 113. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM QUALIFIED REPLACEMENT BENEFIT ARRANGEMENT

34 TAC §§113.1 - 113.6

The Texas County and District Retirement System adopts new Chapter 113, consisting of new §§113.1 - 113.6, concerning the establishment and operation of a qualified governmental excess benefit arrangement under §415(m) of the Internal Revenue Code in accordance with the authority granted to the board in §845.504, Government Code. Sections 113.2, 113.5 and 113.6 are adopted with changes to the proposed text as published in the October 28, 2005, issue of the *Texas Register* (30 TexReg 7011). Sections 113.1, 113.3 and 113.4 are adopted without changes and will not be republished.

The proposed rule §113.2(13) referred to "Article 2". That was a reference to a section that has been redesignated. The correct reference is "§113.3". In addition, the proposed rule §113.5(b)(2) contains a reference to "§113.3(d)". It should read "§113.4(d)". The final version below corrects these section references.

No comments were received regarding adoption of the new rules.

The new rules are adopted under the Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

§113.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) "Act" means the provisions of Texas Government Code, Title 8, Subtitle F, as amended from time to time, establishing the Texas County and District Retirement System.

(2) "Arrangement" means the Texas County and District Retirement System Qualified Replacement Benefit Arrangement, as set forth herein and as amended from time to time.

(3) "TCDRS" or "System" means the Texas County and District Retirement System, as established under the provisions of the Act.

(4) "Benefit Recipient" means any individual who receives a retirement benefit from TCDRS as a Retiree or as a surviving beneficiary of a deceased Member or Retiree. The term may include an alternate payee of a deceased Member or Retiree.

(5) "Benefit" means a retirement benefit accrued under the provisions of the Act.

(6) "Board" means the Board of Trustees of TCDRS.

(7) "Code" means the Internal Revenue Code of 1986, as amended (and corresponding provisions of any subsequent federal tax laws) and the regulations thereunder.

(8) "Effective Date" means January 1, 2006, the effective date of the Arrangement.

(9) "Eligible Member" means a Retiree or a deceased Member or Retiree with respect to an Employer, from and after the date the Employer adopts the Arrangement.

(10) "Employer" means an Employer whose employees are Members of TCDRS with respect to retirement benefits paid by TCDRS under the provisions of the Act; provided that the Employer signs an adoption agreement in the form specified by the Board to adopt the Arrangement.

(11) "Restricted Benefit" means the maximum Benefit permitted to be paid to a Benefit Recipient under the Retirement Plan of the Employer, as limited by Code §415, in accordance with §844.008 of the Act.

(12) "Member" means any individual who accrues or has accrued a Benefit under the Act.

(13) "Participant" means any Benefit Recipient with respect to an Employer who is eligible to participate in the Arrangement in accordance with §113.3 of this chapter.

(14) "Retirement Plan" means the defined benefit plan established under TCDRS for employees of the Employer, and their beneficiaries, in accordance with the Act, and qualified under Code §401(a).

(15) "Retiree" means a Member who receives a Benefit under the Act with respect to an Employer.

(16) "Unrestricted Benefit" means the benefit that would be payable to a Benefit Recipient under the Retirement Plan of the Employer if the limits of Code §415 were not applicable in accordance with §844.008 of the Act.

§113.5. Amendment and Termination.

(a) Amendment and Termination of the Arrangement. The Board reserves the right, in its sole discretion, to amend or terminate the Arrangement at any time and from time to time. By way of example, and not limitation, the Arrangement may be amended or terminated to eliminate all payments with respect to any Member or other individual who has not become eligible to participate in the Arrangement as of the date of such amendment or termination by reason of retirement or death in accordance with §113.3(a) of this chapter. In addition, an amendment or termination may be retroactive to the extent that the Board deems such action necessary, in its sole discretion, to maintain the tax-qualified status of the System or the status of this Arrangement as a qualified governmental excess benefit arrangement as defined in Code §415(m) or to avoid jeopardizing the actuarial soundness of the Retirement Plan of the Employer.

(b) Termination of Employer's Participation.

(1) An Employer may terminate its participation in the Arrangement at any time with the consent of and on terms established by the Administrator.

(2) The Administrator may terminate the participation of an Employer if the Employer fails to comply with the rules established by the Board for the administration of the Arrangement as from time to time amended or modified, or fails to perform in accordance with the adoption agreement. The determination of an Employer's failure to comply and subsequent involuntary termination of participation is within the sole discretion and authority of the Administrator. The Administrator's decision is final, conclusive and binding unless timely appealed directly to the Board in accordance with §113.4(d) of this chapter.

(c) Participants. If an Employer's participation in the Arrangement is voluntarily or involuntarily terminated, then any person who is a Benefit Recipient with respect to that Employer and who is a Participant in the Arrangement shall immediately cease such participation and shall be entitled to no benefits under this Arrangement and no benefits shall be paid or due to such Participant on or after the date of such termination. On the termination of an Employer in the Arrangement, the Employer shall have sole and complete responsibility and liability for paying any benefits that would otherwise be payable under the Arrangement with respect to its Participants, and the System and all other participating Employers shall have no responsibility or liability for any such benefits.

§113.6. General Provisions.

(a) Applicable Law.

(1) All questions pertaining to the validity, construction and administration of the Arrangement shall be determined in conformity with the laws of the State of Texas, except to the extent federal law preempts state law.

(2) If any provision of the Arrangement or the application thereof to any circumstance or person is invalid, the remainder of the Arrangement and the application of such provision to other circumstances or persons shall not be affected thereby.

(b) Indemnification. To the extent allowed by law, an Employer electing to participate in the Arrangement must agree to indemnify, defend, and hold harmless the System, the employees of the System, the Board, and all other Employers participating in the Arrangement from and against any and all direct or indirect liabilities, demands, claims, losses, costs and expenses, including reasonable attorney's fees, arising out of or resulting from the Employer's participation in the Arrangement and/or the Employer's voluntary or involuntary termination of participation in the Arrangement. The agreement of the Employer to indemnify, defend and hold harmless survives the termination of the Employer's participation in the Arrangement and the termination of the Arrangement.

(c) Nonalienation. Benefits under this Arrangement shall not be subject to alienation or legal process, except to the extent permitted under Government Code, Chapter 804.

(d) No Enlargement of Employment Rights. The establishment of the Arrangement shall not confer any legal rights upon any employee or other person for a continuation of employment, nor shall it interfere with the rights of the Employer to discharge any employee and to treat the employee without regard to the effect which that treatment might have upon the employee as a Participant in the Arrangement.

(e) Information Required By Arrangement. Benefit Recipients, other individuals and Employers shall furnish to the Administrator such evidence, data and information as the Administrator considers necessary or desirable for the purpose of administering the Arrangement.

(f) Paying Benefits, Costs and Expenses from TCDRS Assets is Prohibited. No assets of the System shall be used directly or indirectly to pay benefits under the Arrangement or to pay any costs or expenses of administering the Arrangement. Expenses of administering the Arrangement may include expenses for professional, legal, accounting, and other services, and other necessary or appropriate costs of administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 87. TREATMENT

SUBCHAPTER A. PROGRAM PLANNING

37 TAC §87.2, §87.4

The Texas Youth Commission (the commission) adopts an amendment to §87.2, concerning Resocialization Program, and new §87.4, concerning Resocialization Earned Privilege System, without changes to the proposed text as published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7701).

The justification for the new and amended rules is to provide positive reinforcement for youth participation and progress in the commission's Resocialization program.

The amendment to §87.2 adds references to rules which explain in greater detail certain aspects of the Resocialization program. New §87.4 establishes the commission's system for awarding privileges based on youth progress through the Resocialization program.

No comments were received regarding adoption of the amendment and new rule.

The amendment and new rule are adopted under the Human Resources Code, §61.076, which provides the commission with the authority to required youth in its custody to participate in moral, academic, vocational, physical, and correctional training.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Youth Commission
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For further information, please call: (512) 424-6014

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CHAPTER 91. PROGRAM SERVICES

SUBCHAPTER A. BASIC SERVICES

37 TAC §91.5

The Texas Youth Commission (the commission) adopts an amendment to §91.5, concerning Clothing, Hair, and Symbolic Expression, without changes to the proposed text as published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7705).

The justification for amending the section is to avoid duplicative agency rules. The amendment removes content relating to hairstyle requirements which is contained in new §87.4, relating to earned privileges.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 93. YOUTH RIGHTS AND REMEDIES

37 TAC §93.1

The Texas Youth Commission (the commission) adopts an amendment to §93.1, concerning Basic Youth Rights, without changes to the proposed text as published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7706).

The justification for amending the section is availability of accurate and up-to-date agency policy. The amendment adds a reference to new §87.4, concerning Resocialization Earned Privilege System.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 95. YOUTH DISCIPLINE
SUBCHAPTER A. DISCIPLINARY PRACTICES

37 TAC §95.13

The Texas Youth Commission (the commission) adopts an amendment to §95.13, concerning On-Site Disciplinary Consequences, without changes to the proposed text as published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7707).

The justification for amending the section is the availability of accurate and up-to-date agency policy. The amendment adds a reference to new §87.4, concerning Resocialization Earned Privilege System, which describes the consequence of privilege restrictions in greater detail.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 97. SECURITY AND CONTROL
SUBCHAPTER A. SECURITY AND CONTROL

37 TAC §97.36

The Texas Youth Commission (the commission) adopts an amendment to §97.36, concerning Standard Security Unit Program Requirements, without changes to the proposed text as published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7707).

The justification for amending the section is the availability of accurate and up-to-date agency policy. The amendment establishes that youth temporarily placed in the security unit shall receive privileges consistent with Resocialization Phase 0, and adds a reference to new §87.4, concerning Resocialization Earned Privilege System.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dwight Harris
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Texas Youth Commission
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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 803. SKILLS DEVELOPMENT FUND

The Texas Workforce Commission (Commission) adopts amendments to rules concerning the Skills Development Fund. Texas Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency. The Commission has reviewed Chapter 803 and determined that reasons for adopting the chapter exist; however, amendments to the rules are needed in order to update terminology and reflect recent changes in state law.

The Commission adopts the repeal of the following sections of Chapter 803 relating to the Skills Development Fund without changes to the proposal as published in the October 7, 2005, issue of the *Texas Register* (30 TexReg 6412):

Subchapter C, Program Administration After Award of Contract, §§803.31 - 803.36

The Commission adopts the following new sections to Chapter 803 relating to the Skills Development Fund without changes to the proposed text as published in the October 7, 2005, issue of the *Texas Register*:

Subchapter C, Program Administration After Award of Contract, §803.31 and §803.32

The Commission adopts amendments to the following sections of Chapter 803 relating to the Skills Development Fund without changes to the proposed text as published in the October 7, 2005, issue of the *Texas Register*:

Subchapter A, General Provisions Regarding the Skills Development Fund, §803.1 and §803.3

Subchapter B, Program Administration, §§803.12, 803.13, and 803.15

The Commission adopts amendments to the following sections of Chapter 803 relating to the Skills Development Fund with changes to the proposed text as published in the October 7, 2005, issue of the *Texas Register*:

Subchapter A, General Provisions Regarding the Skills Development Fund, §803.2

Subchapter B, Program Administration, §803.11 and §803.14

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART III. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted Chapter 803 rule change is to:

(1) address additional priorities in awarding Skills Development Fund grants as directed by House Bill (HB) 2421, enacted by the 79th Texas Legislature, Regular Session;

(2) eliminate certain rule language also found in statute;

(3) remove administrative processes and procedures that are unnecessary in rules; and

(4) incorporate minor technical edits throughout the rules for improved clarity and consistency.

The additional requirements for Skills Development Fund grants include providing notification of concurrent participation with the Skills Development Fund and the Texas Enterprise Fund with the Office of the Governor Economic Development and Tourism division; training incentives for small businesses; and the availability of funds for incumbent worker training and training focused on economic development.

Effective June 18, 2005, HB 2421 amended Texas Labor Code §303.005 to prohibit an employer from applying for both a Skills Development Fund grant [in conjunction with a community or technical college or the Texas Engineering Extension Service (TEEX)] and a Texas Enterprise Fund grant, unless the employer and the college file an application for concurrent participation.

Additionally, HB 2421 directs the Commission to consider giving priority to training incentives for small businesses. Pursuant to Texas Labor Code §303.003(b)(2), one of the purposes of the Skills Development Fund is to sponsor small businesses, which is addressed in the current rules under Uses of the Fund. The adopted rules add a cross-reference to this existing section under Procedures for Proposal Evaluation to ensure that the purposes of the Skills Development Fund grants are included in the evaluation of proposals.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(Note: Minor, nonsubstantive, editorial changes are made throughout Chapter 803 that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE SKILLS DEVELOPMENT FUND

§803.2. Definitions.

The Commission adopts the removal of §803.2(1), the definition of "assessment," and §803.2(2), the definition of "community-based organization," because both terms are defined in Texas Labor Code §303.001(b)(1) and §303.001(b)(2), respectively.

Current §803.2(3), the definition of "customized training project," is reorganized and renumbered as §803.2(1). The Commission amends the definition to state that not only a private business, but also a business consortium, or a community-based organization only in partnership with a public community college, a technical college, or TEEX, may participate in designing the customized training project.

Comment: One commenter expressed support of the clarification that a business consortium may participate in designing the customized training project.

Response: The Commission appreciates the commenter's support.

Comment: One commenter recommended clarifying the definition of customized training project by specifying that the training offered is not part of the training provider's regular curriculum.

Response: The Commission agrees that customized training must be specific to an employer's needs, and clarifies the definition by adding that a customized training project provides workforce training that is "specifically designed to meet the needs and special requirements of employers" and employees or prospective employees of the private business or business consortium, or members of the trade union.

However, the Commission disagrees that customized training does not include standard courses available through the provider. While customized training extends beyond the course curriculum, it may also encompass standard courses. The overall unique design and development of a training project creates customization. A truly customized training project meets an employer's specific training requirements, such as customizing the curriculum, classes scheduled around the employees' schedules, application to specific company examples, as well as addressing needs in real time with real situations.

The Commission adopts the deletion of §803.2(4), the definition of "director," because it is defined in §800.2 of this title; therefore, it is unnecessary to redefine the term in this chapter. Further, the Commission adopts the proposal to update references to director throughout Chapter 803 to "executive director," to correctly reflect the Chapter 800 definition.

Current §803.2(5), the definition of "grant recipient," is reorganized and renumbered as §803.2(2).

Comment: One commenter recommended allowing the Local Workforce Development Boards (Boards) to be included as grant recipients with a private business or consortium of businesses.

Response: The commenter's recommendation is not within the purview of the Commission's authority. The definition of grant recipient mirrors Texas Labor Code §303.003(b), which directs that the Skills Development Fund be used by public community and technical colleges, community-based organizations, and TEEX as start-up or emergency funds for job training purposes.

Current §803.2(12), the definition of "training provider," is reorganized and renumbered as §803.2(9). The Commission adopts the amended definition to include a community-based organiza-

tion only in partnership with a public community college, technical college, or TEEX as a training provider.

§803.3. Uses of the Fund.

The Commission adopts the amendment of §803.3(a) by specifying that a grant recipient may use the Skills Development Fund as start-up or emergency funds, as specified. Additionally, the Commission adopts the amendment of §803.3(a)(2), which clarifies that the sponsorship of small and medium-sized business networks and consortiums is for the purpose of developing customized training.

SUBCHAPTER B. PROGRAM ADMINISTRATION

§803.11. Grant Administration.

The Commission adopts the removal of §803.11(a) regarding the director's responsibility for grant administration because this information is set forth in Texas Labor Code §303.003(d). Additionally, the Commission adopts the removal of §803.11(b) because this information is an established grants administration principle not necessary in rule.

The Commission adopts new §803.11, which states that grant recipients must enter into an agreement with the Agency to comply with contract requirements, which include, but are not limited to, regulations listed in these paragraphs. The Commission also amends this section by specifying in §803.11(4)(A) that final payment is contingent upon the determination by the executive director, or designee, that a project has met the training objectives, outcomes, and requirements (an attrition rate of up to 15% of the total number of trainees in the contract is allowed). Additionally, the Commission adds in §803.11(4)(B) that the contract's final payment will be withheld for 60 days after the completion of training and after the Agency's receipt of verification from the employer that the trainees are employed.

§803.13. Program Objectives.

The Commission adopts the amendment of §803.13(2) by referring to "local workforce development areas" as "workforce areas," as set forth in the definition in §800.2 of this title. Further, the Commission adopts changing references from local workforce development area to workforce area throughout Chapter 803.

The Commission adopts the amendment of §803.13 by including an additional program objective §803.13(6), which allows the Agency, to the greatest extent practicable, to award Skills Development Fund grants as follows: (1) approximately 60% of the funds may be for job retention training; and (2) the remaining funds may be for training for job creation. With the exception of the Skills Development Fund, limited resources have been available to upgrade the skills of existing workers to assist with job retention. Because the Legislature has recognized that the Skills Development Fund is available for training the existing workforce, as well as training to create new jobs, the Commission is establishing a flexible goal to meet the economic needs of the state and the skills' needs of employers.

Comment: A majority of the commenters supported the use of 60% of the funds for job retention training. Many of these commenters specifically stated that 40% of the funds should be used for new job creation.

Response: The Commission believes the commenters' intent is to support a funding split that ensures incumbent workers, as well as new workers, receive critically needed Skills Development Fund training. While the Commission appreciates the commenters' suggestion of a 60/40 split, the Commission believes that the rule language provides the greatest flexibility to make adjustments, as warranted, to maximize these funds. The increased flexibility allows the Agency to be as responsive as possible to employers, while providing employers the ability to retain and upgrade the skills of current employees, as well as meeting the need for job creation.

Comment: One commenter suggested using 60% of the funds or more as needed to meet the demand of local businesses for job retention training, as well as for the training of new hires, with the remaining funds to be used toward job creation training of new businesses and expansion of existing businesses.

Response: The Commission believes the commenter's suggestion will dilute the impact of the proposed 60/40 split by making each of these categories of funds available for both job retention training, as well as the training of new hires. Further, the commentor may be concerned that a single training project cannot contain both training for job retention and training for job creation and, therefore, is attempting to dilute the funding distinctions by including both activities in both categories. The Commission maintains that the addition of this program objective to §803.13 does not change the proposal submission process or burden entities with applying for separate funds. Rather, the entities are applying for funding that provides them with flexibility because this particular funding mechanism will be monitored and managed at the state level.

Comment: One commenter stated that if job retention projects are to become the main priority of the Skills Development Fund, the Agency should expand proposal eligibility to other job retention efforts, including workplace literacy, adult education, and employee asset development programs. The commenter also stated that the Agency should evaluate the proposed rule change to determine if it limits access to customized training for unemployed or underemployed Texans.

Response: Although the Chapter 803 rules do not specify literacy and adult education as part of the information contained in the proposal, employers still have the ability to incorporate these services for those individuals who need it. The Skills Development Fund does not preclude the use of funds for literacy and adult education, if an employer identifies this to be a need.

The Commission disagrees with the commenter's assertion that proposal eligibility should include employee asset development programs (aka Individual Development Accounts [IDAs]). In its January 1, 2005, Report to the Legislature entitled "Status of the Texas Individual Development Account Pilot Project," the Commission determined that:

Given the cost of administration and program services, the lack of data concerning long-term benefits and the low rate of asset purchases, it would be difficult to recommend implementing IDA programs statewide without further research and outcome data supportive of such an effort.

Additionally, the Commission believes that the rule does not limit access to customized training for unemployed or underemployed Texans. The Commission's intent is, to the greatest extent practicable, to award approximately 60% of the funds for job retention training, allowing the remaining funds to be used for job creation. The Commission believes that training for job creation benefits unemployed individuals by developing skills that may lead to a job. The Commission also believes that underemployed individuals benefit by receiving skills enhancement and occupational

advancement training, thereby helping them climb the career ladder.

The Commission adopts the removal of §803.13(b) because it duplicates information found in §803.13(4).

§803.14. Procedure for Requesting Funding.

For consistency with the definition of "private partner," renumbered as §803.2(4), the Commission adopts the amendment of current §803.14(a) and §803.14(c) to remove the term "prospective." Additionally, references to a "joint" proposal in §803.14(a) and §803.14(b) are removed to eliminate confusion with references to "concurrent" proposals. Further, in §803.14(a) regarding applicable Boards reviewing and commenting on Skills Development Fund proposals, it is the Commission's intent that "applicable" refer only to the workforce areas where there would be a significant impact on job creation or incumbent worker training. To ensure consistency with §803.14(a), which sets forth that private partners or trade unions may partner with community colleges to receive grants from the Skills Development Fund, a technical amendment is made to add the phrase "or trade union" in §803.14(c), (f)(6), and (f)(9).

In addition, §803.14(c) is amended and streamlined to state that a training proposal shall not duplicate a training project available in the workforce area in which the private partner is located.

The Commission adopts new §803.14(d), which requires that proposals disclose other grant funds sought or awarded from the Agency or other state or federal entities. This information does not prevent or hinder consideration of applicants' proposals for Skills Development Fund grants; rather it allows the Agency to provide technical assistance to the applicants for locating additional funding sources that might be available, and to better understand the total amount of funding for all training impacting the project.

Comment: One commenter stated that the purpose and administration of the Skills Development Fund is strengthened by requiring applicants to disclose other potential grant funds that might subsidize training projects.

Response: The Commission appreciates the commenter's support.

The Commission adopts new §803.14(e), which states that applicants shall indicate whether they are submitting concurrent proposals for the Skills Development Fund and the Texas Enterprise Fund. Concurrent proposal is defined in this section as (1) a proposal for the Skills Development Fund that has been filed and is pending at the time the applicant submits a proposal for the Texas Enterprise Fund, or (2) a proposal for the Texas Enterprise Fund that has been submitted and is pending at the time the applicant submits a proposal for the Skills Development Fund. The addition of this new subsection reflects the direction in HB 2421, which does not allow an applicant to apply for both the Skills Development Fund and the Texas Enterprise Fund unless the applicant files for concurrent participation in both programs.

Comment: One commenter supported the proposed rule changes requiring applicants to disclose whether they are submitting concurrent applications for the Texas Enterprise Fund. The commenter also stated that because many companies receiving Texas Enterprise Fund grants may not be contributing to the Unemployment Insurance (UI) Fund-the main source of funding for the Skills Development Fund-the Texas Enterprise Fund should compensate the Skills Development Fund for training costs associated with companies that become dual recipients.

Response: The Commission appreciates the commenter's support for the submission of concurrent applications. HB 2421 amends Texas Labor Code §303.005 by directing the Commission to require an applicant to disclose concurrent participation in the Skills Development Fund and the Texas Enterprise Fund.

Payment into the UI Trust Fund is not an eligibility issue for the Skills Development Fund. HB 2421 sets forth the funding strategies that encompass the Training Stabilization Fund, the set-aside holding fund, the Skills Development Fund, and the Texas Enterprise Fund. The new statute establishes certain percentage amounts to be transferred to the Skills Development Fund and the Texas Enterprise Fund. The training provided by the Skills Development Fund grants for new or existing jobs, which encourage long-term employment opportunities, will generate new or increased contributions to the UI Trust Fund.

The Commission adopts the amendment of §803.14 to add new §803.14(f)(11), which requires that proposals include an indication of a concurrent proposal as set forth in §803.14(e). Current §803.14(d)(11) is renumbered as §803.14(f)(12).

Comment: One commenter suggested the following revisions to the proposal submission form criteria:

1. Delineate more clearly the current pay for each position and any anticipated increases in wages.

Response: The Commission notes that current pay and wage increase data is contained in §803.14(f)(4), which requires the occupation and wages for participants who complete the customized training project.

2. Describe how the employer is involved in the planning and design of the proposed project.

Response: The Commission notes that this information is contained in §803.2(1), which defines customized training project. To further clarify, however, the Commission adds to §803.14(f)(2) that the employer's involvement in the planning and design of the proposed training project be outlined in the proposal submission form.

3. Describe the employer's financial commitment.

Response: The Commission notes that this information is contained in §803.14(f)(5), which requires a budget summary, disclosing anticipated project costs and resource contributions, including the dollar amount the private partner is willing to commit to the project.

4. Describe how the project will be delivered and staffed, including the roles of each partner.

Response: The Commission notes that this information is contained in §803.14(f)(6), which requires each entity's roles and responsibilities to be outlined if a grant is awarded.

5. Include how trainees' progress will be measured and evaluated.

Response: The Commission notes that this information is contained in §803.14(f)(3), which requires that proposals include a brief description of the measurable training objectives and outcomes. However, the Commission amends §803.11 to clarify that trainees' progress will be measured and evaluated prior to final payment at contract closeout.

6. Include a section on sustainability and administration.

Response: The Commission believes that the intent of the commenter's suggestion is to sustain the efforts of the training project once funding has ended. The Skills Development Fund grants provide training to enhance the skills of employers' existing workforce or attract individuals for new jobs. The Commission encourages colleges and employers to utilize their own or other resources as needed to continue to build the skill levels of their workforce to enhance the area's economic competitiveness. While employers are not limited to one grant from the Skills Development Fund, the grants are approved based on merit and other factors set forth in statute and rule, including geographic distribution, and additional grants may not be available.

7. Describe how the Board and workforce centers were involved in the project design and how it will be coordinated locally.

Response: The Commission notes that this information is contained in §803.13(2), which requires that projects be developed in collaboration with the Boards.

§803.15. Procedure for Proposal Evaluation.

The Commission adopts §803.15(a) by adding a cross-reference to the uses of the funds set forth in §803.3(a) to ensure that small businesses are a factor considered in the proposal evaluation procedure. Additionally, for consistency with the definition of private partner at §803.2(4) of this chapter, the Commission adopts §803.15(a) to remove the term "prospective."

General Comments on Subchapter B

Comment: One commenter recommended the elimination of the additional 5% administrative funds for projects that include more than one employer. The commenter stated that this is inconsistent with other Commission-funded programs in which the allowed administrative percentage remains constant regardless of the number of entities involved.

Response: The Commission believes it is necessary to maintain its flexibility to allow additional funds for overseeing the additional entities in a business consortium. Management of these types of grants requires greater oversight on the part of the training institution, including additional monitoring, technical assistance, site visits, and coordination and tracking for performance.

SUBCHAPTER C. PROGRAM ADMINISTRATION AFTER AWARD OF CONTRACT

§803.31. Grant Recipient Responsibilities.

The Commission adopts the repeal of §803.31 in order to remove redundant administrative processes and procedures from rule that are set forth in the Skills Development Fund contracts.

§803.32. Contract Completion Reports.

The Commission adopts the repeal of §803.32 in order to remove redundant administrative processes and procedures from rule that are set forth in the Skills Development Fund contracts.

§803.33. Contract Payment.

The Commission adopts the repeal of §803.33 to remove redundant administrative processes and procedures from rule that are set forth in the Skills Development Fund contracts.

§803.34. Notice to Texas Higher Education Coordinating Board.

The Commission adopts the repeal of §803.34 to remove redundant administrative processes and procedures from rule that are set forth in Texas Labor Code §303.34 and in the memorandum of understanding between the Agency and the Texas Higher Education Coordinating Board regarding the Skills Development Fund.

§803.35. Notice to Local Workforce Development Board.

The Commission adopts the repeal of §803.35 and adopts it as new §803.31, which clarifies that the Agency shall inform a Board in the applicable workforce area of final decisions concerning Skills Development Fund grants in the workforce area.

Comment: One commenter supported the requirement to inform the Board in the applicable workforce area of final decisions concerning Skills Development Fund grants. The commenter stated that Boards may benefit from being notified when a Skills Development Fund application is pending or under review within or near the applicable workforce area.

Response: The Commission appreciates the commenter's support. As under the prior rule, the Commission will notify a Board that has an approved Skills Development Fund project in its workforce area. However, the Commission does not intend to notify Boards in workforce areas near a funded project. Skills Development Fund projects are for specific customized projects, and only Boards that are directly impacted will be notified.

§803.36. Waivers.

The Commission adopts the repeal of §803.36 and adopts it as new §803.32 to clarify that in addition to the executive director, the executive director's designee also has the authority to suspend or waive a section of this chapter that is not statutorily imposed, if there is a showing of good cause and a finding that the public interest would be served by such a suspension or waiver.

General Comments on Chapter 803

Comment: Two commenters expressed strong support for the proposed rules. One commenter stated the amendments provide clarity and reduce unnecessary language and the second commenter thanked the Commission for its support of the Skills Development Fund.

Response: The Commission appreciates the commenters' support.

PART III. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas' twenty-eight Boards and the Texas Association of Workforce Boards (TAWB). During the development of the proposed rules, the Commission considered the information gathered in order to develop rules that provide clear and concise direction to the parties involved.

The Commission received public comments from:

State Representative Norma Chavez, Chair, House Committee on Border and International Affairs

Bonnie Gonzales, ED, Lower Rio Grande Workforce Development Board

Mary Ross, ED, West Central Texas Workforce Development Board

Edelmiro Alaniz, GM, Worth McAllen Bolt & Screw Co.

Roy Arterbury, Call Center Director, Hotels.com

Al Beck, Vice President and General Manager, King's Prosperity, L.P.

Mario Bermudez, General Manager, Textape, Inc.

Boyd Cockrill, Owner, AEF Plating, LLC

Dean Conner, Owner, SGS Industrial

Ron Coronado, Operations Manager, Panasonic Corporation

Norma Diaz, President, Promos, Etc., Inc.

Paul Fielder, Operations, Sapphire Custom Manufacturing

Steven Frank, Area General Manager, Weyerhaeuser

Roberto Garcia, General Manager, HI-TEK Automation Supply

Mark Gibbs, Co-Owner, Rio Grande Container, Inc.

Frank Gomez, Senior Manager, Human Resources, Convergys

Ernesto Gonzales, President, ILP Label Printers

Steve Greer, Senior Vice President, TallyGenicom

Kyle Griffiths, General Manager, General Electric

Adriana Guerrero, Owner, Alpha XL Mold and Tool

Felix Guerrero, Moldmaker/Specialist, Alpha XL Mold and Tool

Julio Guerrero, Owner, Alpha XL Mold and Tool

James R. Hatton, President, Semco Manufacturing

Neal R. Heikkinen, Executive Vice President, Border Comm

Juan Hernandez, Branch Manager, Acetylene Oxygen Company

Liborio Hinojosa, CEO, H&H Foods

Ricardo Hinojosa, Vice President, D&R Precision Manufacturing, Inc.

Dan Ingersoll, PRC Manager, JVC Company of America, Product Return Center

Jeff Jones, Manager, Millard Refrigerated Services

Frank King, Vice President, U.S. Ops and Marketing, Am-Mex

Lorraine Kolenda, Vice President, K-10 Enterprizes, Inc.

Don Kurth, Operations Manager, ALPS Automotive, Inc.

Don Kurth, Operations Manager, Alpine Electronics of America

Kevin LaPorte, General Manager, Titan Plastics Group

Ted C. Link, President/CEO, Link & Associates, Inc.

Ronald Loidl, Senior Manager, Human Resources, Symbol Technologies

Erasmo P. Lozano, Quality Manager, Atlantis Plastics, Inc.

Felipe Marcio, President, DynaCal

Angela Miller, Business Analyst, Seagate Technology

Paula Moore, President, Reynolds International Equipment, L.P.

Sam Olivarez, President, Barrera's Supply Company, Inc.

Maria Patterson, Plant Manager, Gerber Manufacturing, Inc.

Judy Rodriguez, President/CEO, Texas Citrus Exchange

Henry Sanchez, Plant Manager, Hi-Tech Plastics Rio Grande

Stan J. Sawko, General Manager, Action Coil Spring Co., Inc.

Heriberto Solis, Vice President of Operations, Plastron Industries

Steve Stauffer, Director of Operations, Pennero Associates, Inc.

Gerald Stinson, Plant Manager, King's Prosperity L.P.

Lawrence R. Thompson, Jr., Sales Manager, Quality Screw and Nut Logistics

Noe Trevino, Plant Manager, Regency Plastics

Richard Vaughan, President, Burton Auto Supply

Michael Weaver, Director of Operations, Black and Decker

Mike Willis, Executive Director, South Texas Manufacturers Association

Stephen Wolf, Director, Global Operations, TI Automotive

Carlos Zambito, Marketing Director, McAllen Produce Terminal Market

Luis Zeledon, Plant Manager, Humanetics

Mike Allen, President & CEO, McAllen Economic Development Corporation

Don Baylor, Center for Public Policy Priorities

Thomas N. Applegate, Executive Dean, Austin Community College

Jerry Cash, Director of Economic Development, City of Cleburne

Paul J. Curtin, Project Manger, Hunt Valley Development I, LLC

Patty Ford, Training Coordinator, Kilgore College Workforce Development

Ramiro Garza, Jr., Executive Director, Edinburg Economic Development Corporation

Wanda Garza, South Texas College

Juan Gonzalez, Economic Development Director, City of Del Rio

Steve Hardy, Associate Vice President, Continuing Education and Workforce Development, Collin County Community College District

Dr. Richard C. Jolly, Executive Vice President, Midland College

Andrew C. Jones, Ed.D., Vice Chancellor of Educational Affairs, The Dallas County Community Colleges

Marie McDermott, President, Harlingen Area Chamber of Commerce

Mike Midgley, Vice President, Workforce Education and Business Development, Austin Community College

Olivia Rodriguez, South Texas College

Pat Townsend, Jr., President/CEO, Mission Economic Development Authority, Inc.

Danny Uptmore, Corporate & Professional Training, McLennan Community College

Antonio Zavaleta, for U.T. Brownsville and Texas Southmost College

Dr. Frederico Zaragoza, Vice Chancellor, Professional Technical and Workforce Education, Alamo Community College District

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE SKILLS DEVELOPMENT FUND

40 TAC §§803.1 - 803.3

The amendments are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The amended rules affect Title 4, Texas Labor Code, particularly Chapter 301 and Chapter 302, as well as Texas Labor Code, Chapter 303, regarding the Skills Development Fund.

§803.2. Definitions.

In addition to the definitions contained in §800.2 of this title, the following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Customized training project--A project that:

(A) provides workforce training, with the intent of either adding to the workforce or preventing a reduction in the workforce, and is specifically designed to meet the needs and special requirements of:

(i) employers and employees or prospective employees of the private business or business consortium; or

(ii) members of the trade union; and

(B) is designed by a private business or business consortium, or trade union in partnership with:

(i) a public community college;

(ii) a technical college;

(iii) TEEX; or

(iv) a community-based organization only in partnership with the public community and technical colleges or TEEX.

(2) Grant recipient--A recipient of a Skills Development Fund grant that is:

(A) a public community college;

(B) a technical college;

(C) TEEX; or

(D) a community-based organization only in partnership with the public community and technical colleges or TEEX.

(3) Non-local public community and technical college--A public community college or technical college providing training outside of its local taxing district.

(4) Private partner--A person, sole proprietorship, partnership, corporation, association, consortium, or private organization that enters into a partnership for a customized training project with:

(A) a public community college;

(B) a technical college;

(C) TEEX; or

(D) a community-based organization only in partnership with the public community and technical colleges or TEEX.

(5) Public community college--A state-funded, two-year educational institution primarily serving its local taxing district and service area in Texas and offering vocational, technical, and academic courses for certification or associate's degrees.

(6) Public technical college--A state-funded coeducational institution of higher education offering courses of study in vocational and technical education, for certification or associate's degrees.

(7) Texas Engineering Extension Service (TEEX)--A higher education agency and service established by the Board of Regents of the Texas A&M University System.

(8) Trade union--An organization, agency, or employee committee in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(9) Training provider--An entity or individual that provides training, including:

(A) a public community college;

(B) a technical college;

(C) TEEX;

(D) a community-based organization only in partnership with the public community college or technical college or TEEX; or

(E) a person, sole proprietorship, partnership, corporation, association, consortium, governmental subdivision, or public or private organization with whom a public community or technical college or TEEX has subcontracted to provide training.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505996
Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Effective date: January 9, 2006
Proposal publication date: October 7, 2005
For further information, please call: (512) 475-0829

SUBCHAPTER B. PROGRAM ADMINISTRATION

40 TAC §§803.11 - 803.15

The amendments are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The amended rules affect Title 4, Texas Labor Code, particularly Chapter 301 and Chapter 302, as well as Texas Labor Code, Chapter 303, regarding the Skills Development Fund.

§803.11. Grant Administration.

Grant recipients must enter into an agreement with the Agency to comply with contract requirements that include, but are not limited to:

(1) submitting all required reports, including financial and performance reports, in the format and time frame required by the Agency;

(2) maintaining fiscal data needed for independent verification of expenditures of funds received for the customized training project;

(3) cooperating and complying with Agency monitoring activities as required by Chapter 800, Subchapter H of this title (relating to Agency Monitoring Activities); and

(4) submitting contract completion reports:

(A) The final payment is contingent upon the executive director's, or designee's, determination that a project has met the training objectives, outcomes, and requirements (an attrition rate of up to 15% of the total number of trainees in the contract is allowed).

(B) The final payment of the contract will be withheld for 60 days after the completion of training and after receipt by the Agency of verification from the employer that the trainees are employed.

§803.14. Procedure for Requesting Funding.

(a) After obtaining the review and comments of the Board in the applicable workforce area(s), where there is a significant impact on job creation or incumbent worker training, a private partner or a trade union, together with a public community or technical college or TEEX, shall present to the executive director, or designee, a proposal requesting funding for a customized training project or other appropriate use of the fund.

(b) TEEX, or the public community or technical college that is a partner to a training proposal for a grant from the Skills Development Fund, may be non-local.

(c) The training proposal shall not duplicate a training project available in the workforce area in which the private partner or trade union is located.

(d) Proposals shall disclose other grant funds sought or awarded from the Agency or other state and federal entities for the proposed job training project.

(e) Applicants shall indicate whether they are submitting concurrent proposals for the Skills Development Fund and the Texas Enterprise Fund. For the purposes of this subsection, "concurrent proposal" shall mean:

(1) a proposal for the Skills Development Fund that has been submitted and is pending at the time an applicant submits a proposal for the Texas Enterprise Fund; or

(2) a proposal for the Texas Enterprise Fund that has been submitted and is pending at the time an applicant submits a proposal for the Skills Development Fund.

(f) Proposals shall be written and contain the following information:

(1) The number of proposed jobs created and/or retained;

(2) A brief outline of the proposed training project, including the skills acquired through training and the employer's involvement in the planning and design;

(3) A brief description of the measurable training objectives and outcomes;

(4) The occupation and wages for participants who complete the customized training project;

(5) A budget summary, disclosing anticipated project costs and resource contributions, including the dollar amount the private partner is willing to commit to the project;

(6) A signed agreement between the private partner or trade union and the public community or technical college or TEEX outlining each entity's roles and responsibilities if a grant is awarded;

(7) A statement explaining the basis for the determination that there is an actual or projected labor shortage in the occupation in which the proposed training project will be provided that is not being met by an existing institution or program in the workforce area;

(8) A comparison of costs per trainee for the customized training project and costs for similar instruction at the public community or technical college or TEEX;

(9) A statement describing the private partner's or trade union's equal opportunity employment policy;

(10) A list of the proposed employment benefits;

(11) An indication of a concurrent proposal as required by subsection (e) of this section; and

(12) Any additional information deemed necessary by the Agency to complete evaluation of a proposal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2005.

TRD-200505999
Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Effective date: January 9, 2006
Proposal publication date: October 7, 2005
For further information, please call: (512) 475-0829

♦ ♦ ♦

SUBCHAPTER C. PROGRAM ADMINISTRATION AFTER AWARD OF CONTRACT

40 TAC §§803.31 - 803.36

The repeal is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The repeal affects Title 4, Texas Labor Code, particularly Chapter 301 and Chapter 302, as well as Texas Labor Code, Chapter 303, regarding the Skills Development Fund.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200506001

Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
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For further information, please call: (512) 475-0829

♦ ♦ ♦

40 TAC §803.31, §803.32

The new sections are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The sections affect Title 4, Texas Labor Code, particularly Chapter 301 and Chapter 302, as well as Texas Labor Code, Chapter 303, regarding the Skills Development Fund.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
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Proposal publication date: October 7, 2005
For further information, please call: (512) 475-0829

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 22 TAC §375.9(a)

NOTICE

COMPLAINTS

CONCERNING ANY PERSON LICENSE BY THE
TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

SHOULD BE SENT TO

TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS
INVESTIGATION DIVISION
P.O. BOX 12216
AUSTIN, TX 78711-2216

TEL: (512) 305-7000
NATIONAL: 1-800-821-3205
FAX: (512) 305-7165 or (512) 305-7003
WEB: http://www.foot.state.tx.us

This Notice is required to be "on a sign prominently displayed in the place of business of each individual or entity regulated by the Board" (22 TAC §375.9)

AVISO

QUEJAS

SOBRE CUALQUIER PERSONA LICENCIADA/REGULADA POR: CONSEJO ESTAL DE EXAMINADORES MÉDICOS DE PODIATRIA DE TEJAS

DEBEN DE SER ENVIADAS HA:

TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS
INVESTIGATION DIVISION
P.O. BOX 12216
AUSTIN, TX 78711-2216

TEL: (512) 305-7000
LINEA NACIONAL: 1-800-821-3205
FAX: (512) 305-7165 o (512) 305-7003
WEB: http://www.foot.state.tx.us

Este AVISO será visualizado de una manera llamativa y destacada en todos los negocios al sujeto de las regulaciones de la Consejo donde se podrá ver por todos los pacientes, conforme a 22 TAC §375.9

Figure: 22 TAC §375.23(i)

TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS
P.O. Box 12216
Austin, Texas 78711-2216

MEDICAL PROFESSIONAL LIABILITY CLAIMS REPORT

FILE ONE REPORT FOR EACH DEFENDANT PODIATRIC PHYSICIAN.

PART I. COMPLETE FOR ALL CLAIMS OR COMPLAINTS AND FILE WITH THE TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS WITHIN 30 DAYS FROM RECEIPT OF COMPLAINT OR CLAIM. INCLUDE COPY OF CLAIM LETTER AND/OR PLAINTIFF'S COMPLAINT.

1. Name and address of insurer: _____

_____

2. Defendant podiatric physician: _____

License number: _____

3. Plaintiff's name: _____

4. Policy number: _____

5. Date claim reported to insurer/self-insured podiatric physician: _____

6. Type of complaint: _____ claim only _____ lawsuit

7. Initial reserve amount after investigation: _____
(If this is not determined within 30 days, report this data within 105 days of filing the Part I report with T.S.B.P.M.E.)

_____ _____
Person completing this report Phone number

PART II. COMPLETE AFTER DISPOSITION OF THE CLAIM AS DEFINED IN 22 TAC §375.23, INCLUDING DISMISSALS OR SETTLEMENTS. FILE WITH THE T.S.B.P.M.E. WITHIN 105 DAYS AFTER DISPOSITION OF THE CLAIM. A COPY OF COURT ORDER OR SETTLEMENT AGREEMENT MAY BE USED AS PROVIDED IN 22 TAC §375.23.

8. Date of disposition: _____

9. Type of disposition:
_____ (1) Settlement
_____ (2) Judgment after trial
_____ (3) Other (please specify) _____

10. Amount of indemnity agreed upon or ordered on behalf of this defendant:

$_____ Note: If percentage of fault was not determined by the court or insurer in the case of multiple defendants, the insurer may report the total amount paid for the claim followed by a slash and the number of insured defendants. (example: $1000,000/3)

11. Appeal, if known: _____ Yes _____ No. If yes, which party: _____

_____ _____

Person completing this report Phone number

Figure: 22 TAC §376.5(c)

Complaint/Penalty Schedule

Category of Complaint	Death	Substance Abuse	Fraud	Negligence	Advertising	Fees	Records	Inappropriate Physician Behavior	Impaired Physician	Office Inspection
Priority/Severity Level										
I	☑	☑		☑					☑	
II		☑	☑	☑				☑	☑	☑
III		☑	☑	☑		☑		☑		☑
IV		☑	☑	☑	☑	☑	☑	☑		☑
V		☑	☑	☑	☑	☑	☑	☑		☑

Severity Levels

Level 1 Violations that have, had, or may have an adverse impact on the health or safety of a patient to include serious harm, permanent injury, or death. May result in license revocation.

Level 2 Violations that have, had, or may have an adverse impact on the health or safety of a patient but less serious than Level 1 and may result in revocation/suspension of license.

Level 3 Violations that have, had, or may have an impact on the safety or health or a patient. Violations may be repeated and/or flagrant and may result in probated suspension.

Level 4 Violations that have, had, or may have more than minor significance, but if left uncorrected or unrecognized could lead to more serious circumstances resulting in possible reprimand and/or administrative penalties.

Level 5 Violations that are non-serious infractions of the Act or Rules that may result in an informal reprimand or letter of reprimand.

* It should be noted that the matrix is to be used only as a guide. Due to the varying nature of complaints and supporting documentation, penalties assessed may be placed in different severity levels.

Figure: 22 TAC §376.25

TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

COMPLAINT FORM

DATE: _____

It is very important that you fill out this form completely. Please use a typewriter or print in black ink. If we are unable to read your complaint, we will not be able to help you.

1.	COMPLAINT'S FULL NAME (Print or Type)	COMPLAINTANT'S ADDRESS (Street)
	HOME TELEPHONE #: ( ) - WORK TELEPHONE #: ( ) -	(City, State, Zip)
2.	PODIATRIST INVOLVED: (Print or Type)	
	ADDRESS	CITY, STATE, ZIP
	OFFICE TELEPHONE #: ( ) -	
3.	(Other Podiatry Opinions Received) NAME:	ADDRESS: TELEPHONE: ( ) -
	(Other cont.) NAME:	ADDRESS: TELEPHONE: ( ) -

4.	**Nature of Complaint(s)** Clearly state the nature of your complaint and enclose copies of any records, or reports from a second podiatrist which will support your statement. *COMPLAINT FORM MUST BE SIGNED.* (Additional space on back. Attach Additional Pages if Necessary.)

Mail to:

TEXAS STATE BOARD OF PODIATRIC
MEDICAL EXAMINTERS
P.O. BOX 12216
AUSTIN, TEXAS 78711-2216

_____
SIGNATURE

_____
DATE

THE CITIZEN COMPLAINT PROCESS

WHO MAY FILE A COMPLAINT?

Anyone may file a complaint with the Board of Podiatry Examiners against a podiatrist.

HOW DO I FILE A COMPLAINT?

A complaint must be submitted in writing. You may use this form for that purpose.

HOW ARE COMPLAINTS INVESTIGATED?

Trained professionals investigate the complaints. An investigator may contact you for additional information, to secure your written statement, or for written permission to obtain copies of your medical records.

A complaint involving physician competency may require a lengthy investigation by medical experts.

All investigative material (including medical records, investigator's reports, and reviews by board consultants) become part of the board's investigative files.

WILL I BE TOLD THE STATUS OF MY COMPLAINT

You will receive a letter acknowledging receipt of your complaint.

If your complaint is within the board's jurisdiction, we will notify you of the status of your complaint approximately every 90 days, until final action is taken.

Should your complaint be outside the Board's jurisdiction, we will notify you.

WHAT COMPLAINTS DO NOT FALL WITHIN THE BOARD'S JURISDICTION?

Rudeness complaints. These issues can be directed to your local Podiatric Society.

Complaints against doctors who are not D.P.M.s and complaints regarding other health care providers or hospitals. Such complaints should be directed to the appropriate state licensing agency.

Complaints regarding the unlicensed practice of podiatry should be referred to your local police department, as this activity is a criminal misdemeanor.

WHAT COMPLAINTS ARE WITHIN THE BOARD'S JURISDICTION?

The most frequent types of consumer complaints are:

Non-therapeutic prescribing/administering of a drug or treatment;

Professional incompetency;

Inability to practice podiatry by reason of mental or physical impairment (alcohol or chemical abuse, mental or physical condition);

Unprofessional conduct which may endanger the public.

WHAT ACTION CAN THE BOARD TAKE?

If we lack sufficient evidence of a violation of the Podiatry Practice Act, then we will close the investigation and notify you.

If the investigation establishes that a podiatrist violated the Podiatry Practice Act, the board may order corrective procedures or disciplinary action ranging from a written reprimand to the most severe measure, revocation of license.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of Requests for Proposals

Notice is hereby given of three Requests for Proposals by the Texas State Affordable Housing Corporation (TSAHC) for Bond Counsel, Financial Advisor, and for General Counsel/Lender Counsel/Issuer Counsel for its multifamily and single family affordable housing programs, including its multifamily and single family private activity bond programs. Proposals will be due at the TSAHC offices in Austin by 5:00 p.m. on Friday, January 20, 2006. The Requests for Proposals can be viewed and downloaded from TSAHC's web site (www.tsahc.org). Any questions about the Requests for Proposals should be directed to Katherine Closmann by E-mail at kclosmann@tsahc.org, by fax at (512) 477-3557, or by phone at (512) 477-3555, Ext. 424.

TRD-200506053
David Long
President
Texas State Affordable Housing Corporation
Filed: December 21, 2005

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Texas Building and Procurement Commission

Request for Proposals

The Texas Building and Procurement Commission (TBPC), on behalf of the Texas Department of Public Safety (DPS), announces the issuance of a Request for Proposal (RFP) #303-6-10690 to solicit proposals to sell qualified parcels of land to DPS, located generally in the City of Waxahachie, Ellis County, Texas bounded by the Waxahachie extraterritorial jurisdiction line. The site should contain a minimum of 3.5 acres of land or 152,460 square feet of contiguous land. The preferred size is 5 acres or 217,800 square feet of contiguous land. However, sites greater than 5 acres will be considered.

The deadline for questions is January 3, 2006; and the deadline for proposals is January 11, 2006 at 3:00 P.M. The award date is to be determined. TBPC reserves the right to accept or reject any or all proposals submitted. TBPC is under no legal or other obligation to issue an award on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TBPC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TBPC Purchaser Richard Ehlert at (512) 463-0209. A copy of the RFP may be downloaded from the *Electronic State Business Daily* at: http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=62385.

TRD-200506093
Susan Maldonado
Assistant General Counsel
Texas Building and Procurement Commission
Filed: December 22, 2005

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of December 16, 2005, through December 22, 2005. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on December 28, 2005. The public comment period for these projects will close at 5:00 p.m. on January 27, 2006.

FEDERAL AGENCY ACTIONS:

Applicant: Davis Petroleum Corporation; Location: The project site is located in Galveston Bay, in State Tract (ST) 199, approximately 1.4 miles northwest of Smith Point, offshore Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Smith Point, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 324854; Northing: 3269030. Project Description: The applicant proposes to install, operate, and maintain structures and equipment necessary for oil and gas drilling, production and transportation activities. Specifically, the applicant proposes to install a 30-foot-long by 7-foot-wide well platform, a 70-foot by 70-foot production platform, and associated flowlines from the well to the production platform. Approximately 2,667 cubic yards of fill material will be discharged into the bay in order to support the drilling rig. All activities will occur in ST 199. CCC Project No.: 06-0103-F1; Type of Application: U.S.A.C.E. permit application #24026 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: Port of Houston Authority; Location: The project is located on Barbours Cut, along Galveston Bay, in Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: La Porte, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 305400; Northing: 3285000. Project Description: The applicant proposes to amend Department of the Army Permit No. 10902(05) to add Spilmans Island and Alexander Island Dredge Material Placement Areas. The applicant also proposes to add the following methods of dredging to the authorization: mechanical, water injection dredging, and Silt Blade method. All methods of dredging will only be performed within the approved dredge area. The dredge material will be kept within the approved dredge area. CCC Project No.: 06-0104-F1; Type of Application: U.S.A.C.E. permit application #10902(06) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33

U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: Kahala Development, L.L.C.; Location: The project is located adjacent to the Gulf of Mexico, immediately southwest of the Eight Mile Road and FM 3005 intersection in Galveston, Galveston County, Texas. The proposed project and mitigation sites can be located on the U.S.G.S. quadrangle entitled: Lake Como, Texas. Approximate UTM Coordinates in NAD 27 (meters) for the project site are: Zone 15; Easting: 316507; Northing: 3235193; mitigation site: Zone 15; Easting: 310284; Northing: 3232004. Project Description: The applicant proposes to retain approximately 0.96 acres of fill in adjacent coastal dune swale wetlands and place new fill into approximately 6.64 acres of adjacent coastal dune swale wetlands for the purpose of constructing a single-family residential development, a small commercial retail development, roadways, other needed infrastructure and green space. The applicant has stated that the proposed development meets the criteria for a Traditional Neighborhood Development (TND). The objective of a TND is to provide a small self-sufficient community that encourages walking and bicycling over the use of automobiles. The proposed project will result in a total discharge of approximately 22,400 cubic yards of permanent fill within a total of 7.6 acres of jurisdictional wetlands. The project consists of two phases, Phase I and Phase II. A portion of the Phase I development has already been completed. The applicant proposes to avoid, restore or create 3.6 acres of jurisdictional wetlands on site and to enhance approximately 12.86 acres of jurisdictional wetlands and create 12.46 acres of jurisdictional wetlands at the off site mitigation location. Additionally, the applicant proposes to create a total of 5.54 acres of upland prairie habitat and 4.6 acres of upland live oak habitat at the proposed off site mitigation location. The applicant proposes to preserve the entire 50 acre off site mitigation area. This project was initially placed on public notice by the U.S. Army Corps of Engineers (Corps), Galveston District, on 30 April 2004 under Permit Application Number 23282. However, during the review process, a determination was made that unauthorized fill material had been discharged on the site in violation of Section 404 of the Clean Water Act. Permit Application Number 23282 was subsequently withdrawn on 21 May 2004. The violation resulted in an investigation, which led to a voluntary settlement agreement between the Corps and Kahala Development, LLC, which was executed on 16 September 2004. Kahala Development LLC has met all of the settlement agreement provisions. The wetland acreage for the project area was verified by the Corps on 10 December 2003 (file number D-14079/03). The proposed off site mitigation area is currently being reviewed for verification by the Corps (File number D-10779/03); however, a final delineation verification has not been completed. Additionally, the proposed off-site mitigation area is currently permitted as Disposal Maintenance Placement Area (DMPA) "D" for Department of the Army (DA) permit 17800 and all of its amendments. DA permit 17800(12) is currently on Public Notice for proposed amendments. One of the proposed amendments is to remove DMPA "D" from the permit. CCC Project No.: 06-0106-F1; Type of Application: U.S.A.C.E. permit application #23756 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Tammy Brooks, Program Specialist, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200506121
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: December 28, 2005

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Comptroller of Public Accounts

Notice of Award

Pursuant to Chapters 403, 2305; and Chapter 2254, Subchapter A, Texas Government Code, the Comptroller of Public Accounts (Comptroller) State Energy Conservation Office (SECO) announces the following contract awards:

The notice of request for proposals was published in the June 24, 2005, issue of the *Texas Register* (30 TexReg 3745) (RFP #172j).

The contractors will provide energy engineering services for the Local Government Program.

Two contracts were awarded as follows:

1. Carter & Burgess, Inc., 777 Main Street, P. O. Box 901058, Fort Worth, TX 76101-2058. The total amount of this contract is not to exceed $400,000.00. The term of the contract is December 21, 2005 through August 31, 2006; and

2. Texas Energy Engineering Services, Inc., 1301 S. Capital of Texas Highway, Capital View Center, Suite B-325, Austin, Texas 78746. The total amount of this contract is not to exceed $200,000.00. The term of the contract is December 21, 2005 through August 31, 2006.

The project reviews will be completed on or before August 31, 2006.

TRD-200506059
Pamela Smith
Deputy General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 21, 2005

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of January 2, 2006 - January 8, 2006 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of January 2, 2006 - January 8, 2006 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of January 1, 2006 - January 31, 2006 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by §303.005 for the period of January 1, 2006 - January 31, 2006 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200506118
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 28, 2005

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Texas Education Agency

Request for Proficiency Tests for the Assessment of Limited English Proficient Students

Filing Date. December 28, 2005

Filing Authority. Texas Education Code, §29.056(2) and (3); 19 Texas Administrative Code (TAC) §§89.1225(a) - (f) and (h); 89.1220(g); and 89.1265(a)

Description. The Texas Education Agency (TEA) is notifying assessment publishers that proficiency assessments and/or achievement tests may be submitted for review for the *List of State Approved Tests for the Assessment of Limited English Proficient Students*. Texas Education Code (TEC), §29.056(a)(2), authorizes TEA to compile a list of approved assessments for the purposes of identifying students as limited English proficient for entry into or exit from bilingual education and/or special language programs; annually assessing oral language proficiency in English and Spanish; and measuring reading and writing proficiency in English and Spanish for program placement. The state-approved tests placed on the list must be based on scientific research and must measure oral language proficiency in listening and speaking in English and Spanish from Prekindergarten (PK) to Grade 12. Assessments must also measure reading and writing in English and Spanish from PK to Grade 12. Reading and writing assessments indicate placement in the bilingual/English as a Second Language (ESL) program and are not for entry purposes.

Norm-referenced standardized achievement tests in English will be used for identification, entry into and exit from programs and may be used for formative assessments.

Norm-referenced standardized achievement tests in Spanish may be used for placement purposes only. All tests to be included on the *List of State Approved Tests for the Assessment of Limited English Proficient Students* must be re-normed every six years to meet the criteria specified in TEC, §39.032, which requires that standardization norms not be more than six years old at the time the test is administered. The 2006-2007 *List of State Approved Tests for the Assessment of Limited English Proficient Students* will be in effect only for the 2006-2007 school year. Assessments must be resubmitted annually to undergo the review process even if they have been approved in prior years.

The Assessment Committee, comprised of educators from throughout the state and TEA staff, will review and approve the 2006 - 2007 *List of State Approved Tests for Assessment of Limited English Proficient Students*. The Assessment Committee may choose to change the criteria and/or effective dates at a future time.

Selection Criteria. Assessment publishers will be responsible for submitting tests that they wish to be reviewed for consideration for inclusion on the 2006-2007 *List of State Approved Tests for Assessment of Limited English Proficient Students*. All tests submitted for review must be based on scientific research and must measure oral language proficiency in listening and speaking in English and Spanish from PK to Grade 12. Assessments must measure reading and writing in English and Spanish from PK to Grade 12 and must meet the state criteria for reliability and validity. Therefore, technical manuals must also be submitted. Assessments must also measure specific proficiency levels in oral language, reading, and writing in both English and Spanish. Assessment instruments (English and Spanish) submitted for review will be grouped in the following categories: (1) Oral Language Proficiency Tests in English in Listening and Speaking domains; (2) Oral Language Proficiency Tests in Spanish in Listening and Speaking domains; (3) Reading and Writing Proficiency in English; (4) Reading and Writing Proficiency in Spanish; and (5) Ability Tests/Gifted and Talented. Publishers are not required to submit proposals for all categories.

Proposals must be submitted and presented on January 23, 2006, to be considered for inclusion on the *List of State Approved Tests for the Assessment of Limited English Proficient Students*. Assessment publishers will be required to attend the review of the assessments on January 23, 2006, which will be held at the William B. Travis Building, Room 1-111, 1701 North Congress Avenue, Austin, Texas. Complete official sample copies with comprehensive explanations and technical manuals must be presented at that time. Only materials presented on January 23, 2006, will be considered for approval. Any materials and/or revisions submitted after the deadline cannot be reviewed until the following year.

Further Information. For clarifying information, contact Georgina Gonzalez, Director of Bilingual/ESL, or Susie Coultress, Assistant Director of Bilingual/ESL, Texas Education Agency, (512) 475-3555.

TRD-200506124
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: December 28, 2005

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Texas Commission on Environmental Quality

Notice of District Petition

Notices mailed December 19, 2005 through December 21, 2005

TCEQ Internal Control No. 11042005-D02; Rio Vista C.M.I., Ltd. (Petitioner) filed a petition for creation of Fort Bend County Municipal Utility District No. 145 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lien holder, Wachovia Bank, National Association, on the property to be included in the proposed District, and the Petitioner has provided the TCEQ with a certificate evidencing its consent to the creation of the proposed District; (3) the proposed District will contain approximately 124.65 acres located within Fort Bend County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Richmond, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 2005-14, effective August 15, 2005 the City of Richmond, Texas, gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, improve, maintain and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) purchase, construct, acquire, maintain and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for

the property in the proposed District; (3) control, abate and amend local storm waters or other harmful excesses of water; and (4) construct, acquire, improve, maintain, and operate additional facilities, systems, plants, enterprises, parks and recreational facilities consistent with the purposes for which the District is created, all as more particularly described in an engineer's report filed simultaneously with the filing of the petition. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $10,500,000.

TCEQ Internal Control No. 11022005-D02; Lookout Group, Inc., general partner of Lookout Partners, L.P. and LOG/HGM Bastrop, L.P. (Petitioner) filed a petition for creation of Stonewall Ranch Municipal Utility District (District) with the TCEQ. The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District; (3) the proposed District will contain approximately 283.53 acres located in Williamson County, Texas; and (4) the proposed District is within the extra-territorial jurisdiction of the City of Liberty Hill, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 05-R-22 , effective May 10, 2005, the City of Liberty Hill, Texas, gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain and operate a waterworks and sanitary sewer system for municipal, domestic, industrial and commercial purposes; (2) acquire, construct, operate and maintain a system to gather, conduct, divert, and control local storm water or other local harmful excesses of water within the District; (3) purchase, acquire, construct, own, lease, extend, improve, operate, maintain, and repair such additional improvements, facilities, plants, equipment, and appliances consistent with the purposes for which the District is organized, all as more particularly described in an engineer's report filed simultaneously with the filing of the petition. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $13,000,000.

TCEQ Internal Control No. 11022005-D03; New Sweden MPC, L.P. (Petitioner) filed a petition for creation of New Sweden Municipal Utility District No. 1 (District) with the TCEQ. The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lien holder, City National Bank of Taylor, Texas, by joinder, through Bernard A. Mokry Inc., on the property to be included in the proposed District, and the Petitioner has provided the TCEQ with a certificate evidencing the lien holder's consent to the creation of the proposed District; (3) the proposed District will contain approximately 419.4 acres located in Travis County, Texas; and (4) no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain and operate a waterworks and sanitary sewer system for municipal, domestic, industrial and commercial purposes; (2) acquire, construct, operate and maintain a system to gather, conduct, divert, and control local storm water or other local harmful excesses of water within the District; (3) purchase, acquire, construct, own, lease, extend, improve, operate, maintain, and repair such additional improvements, facilities, plants, equipment, and appliances consistent with the purposes for which the District is organized, all as more particularly described in an engineer's report filed simultaneously with the filing of the petition. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $63,490,000.

TCEQ Internal Control No. 11092005-D11; 525 Investors LTD. (Petitioner) filed a petition for creation of Montgomery County Municipal Utility District No. 115 (District) with the TCEQ. The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District; (3) the proposed District will contain approximately 577.1 acres located in Montgomery County, Texas; and (4) no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain and operate a waterworks and sanitary sewer system for municipal, domestic, industrial and commercial purposes; (2) acquire, construct, operate and maintain a system to gather, conduct, divert, and control local storm water or other local harmful excesses of water within the District; and (3) purchase, acquire, construct, own, lease, extend, improve, operate, maintain, and repair such additional improvements, facilities, plants, equipment, and appliances consistent with the purposes for which the District is organized, all as more particularly described in an engineer's report filed simultaneously with the filing of the petition. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $33,974,500.

TCEQ Internal Control No. 11292005-D01; 700 Deerfield Katy, L.P. (Petitioner) filed a petition for creation of Fort Bend County Municipal Utility District No. 182 (District) with the TCEQ. The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lien holder, Deerfield Opportunities Fund, LLC., on the property to be included in the proposed District, and the Petitioner has provided the TCEQ with a certificate evidencing its consent to the creation of the proposed District; (3) the proposed District will contain approximately 715.47 acres located within Fort Bend County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Fulshear, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 05-934, effective October 19, 2005, the City of Fulshear, Texas, gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain, and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, maintain, and operate works, improvements, facilities, plants, equipment, and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; (3) abate, amend, and control local storm waters; and (4) purchase, construct, acquire, improve, maintain, and operate additional facilities, systems, plants, enterprises, parks, and recreational facilities consistent with the purposes for which the District is

created, all as more particularly described in an engineer's report filed simultaneously with the filing of the petition. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $55,000,000.

INFORMATION SECTION

The TCEQ may grant a contested case hearing on a petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing;" (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided below.

The Executive Director may approve a petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team at (512) 239-4691. Si desea información en Español, puede llamar al 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200506119

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: December 28, 2005

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Notice of Meeting Concerning the Addition of the Rogers Delinted Cottonseed Company to the State Superfund Registry

The Texas Commission on Environmental Quality (TCEQ) is required under the Texas Solid Waste Disposal Act (the Act), Texas Health and Safety Code, Chapter 361, to annually publish a state registry that identifies facilities that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The most recent registry listing of these facilities was published in the April 29, 2005, issue of the *Texas Register* (30 TexReg 2583). This notice was also published on January 5, 2006, in the *Colorado City Record.*

In accordance with the Act, §361.184(a), the TCEQ must publish a notice of intent to list a facility on the state registry of Superfund sites in the *Texas Register* and a newspaper of general circulation in the county in which the site is located. With this publication, the TCEQ is giving notice that the facility is eligible for listing and therefore the TCEQ proposes to list it on the state registry. The TCEQ also proposes a commercial/industrial land use, rather than a residential land use, as appropriate for the facility. This land use proposal is in keeping with the requirements located in 30 TAC §350.53, Land Use Classification. Determination of appropriate land use may impact the remedial investigation and remedial action for the facility.

This notice also specifies the general nature of the potential endangerment to public health and safety or the environment as determined by information currently available to the TCEQ.

The facility is located in Colorado City, Mitchell County, Texas. The geographic coordinates of the facility are latitude 32 degrees 24 minutes 41.81 seconds, longitude 100 degrees 51 minutes 59.84 seconds. The description of the facility is based on information available at the time the facility was evaluated with the Hazard Ranking System (HRS). The HRS is the principal screening guide used by the TCEQ to evaluate potential, relative risk to public health and the environment from releases or threatened releases of hazardous substances. The facility description may change as additional information is gathered on the sources and extent of contamination.

The facility is located near the intersection of Interstate Highway 20 and State Highway 208. The facility is 49.1 acres in size. The company operated on 9.1 acres of property and the additional 40 acres were used for irrigation with wastewater generated during its operation. The operating area consists of two storage buildings, a small office with weigh station, process building, two acid tanks, and two surface impoundments. The facility operated a wet acid cotton seed delinting process to provide seed for planting from 1965 to 1983. The facility incorporated areas for receiving, storing, delinting, applying chemicals, and shipping of cottonseed. The delinting process utilized concentrated sulfuric acid to dissolve cotton fibers from the seed. Used acid and rinse waters containing the decomposing fibers were discharged from the process area to a sump through an underground clay pipe into one of the two surface impoundments north of the facility. The wastewater in the larger impoundment was documented to have a pH of <1. Seeds were treated with pesticide or fungicide prior to packing. The TCEQ installed a security fence around the surface impoundments and all the buildings in January 2005. TCEQ also removed a contaminated soil pile, drums, and containers in February and March of 2005.

A public meeting will be held on February 9, 2006, 7:00 p.m., at the Colorado City Civic Center, 157 West 2nd Street, Colorado City, Texas. The purpose of this meeting is to obtain additional information regarding the facility relative to its eligibility for listing on the state registry, identify additional potentially responsible parties, and obtain public input and information regarding the appropriate use of land on which the facility is located. The public meeting will be legislative in nature and is not a contested case hearing under the Administrative Procedure Act, Texas Government Code, Chapter 2001.

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted prior to the public meeting must be received by 5:00 February 8, 2006, and should be sent in writing to Mr. Zebao Li, Project Manager, Texas Commission on Environmental Quality, Remediation Division, MC 143, P.O. Box 13087, Austin, Texas 78711-3087 or facsimile at (512) 239-2450. The public comment period for this proposed action will end at the close of the public meeting on February 9, 2006.

A portion of the record for this facility, including documents pertinent to the proposal of the facility to the state registry, is available for review during regular business hours at the Mitchell County Public Library, 340 Oak Street, Colorado City, Texas 79512. Copies of the record may also be obtained during regular business hours at the TCEQ's Records Management Center, Records Customer Service, Building E, First Floor, 12100 Park 35 Circle, Austin Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to pay-

ment of a fee. Parking is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

Persons who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (800) 633-9363 or (512) 239-5674. Requests should be made as far in advance as possible.

For information about the facility, please call Mr. Li at (512) 239-2229. For information about the public meeting please, call John Flores, TCEQ Community Relations at (800) 633-9363.

TRD-200506113

Stephanie Bergeron Perdue

Acting Deputy Director, Office of Legal Services

Texas Commission on Environmental Quality

Filed: December 27, 2005

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Notice of Opportunity for Comments Concerning a Proposed Amendment to the List of *De Minimis* Facilities or Sources

The Texas Commission on Environmental Quality (TCEQ), under 30 TAC Chapter 116, requests public comment concerning a proposed amendment to the "List of *De Minimis* Facilities or Sources" authorized by §116.119.

The TCEQ received a request to amend the "List of *De Minimis* Facilities or Sources" by adding: "A fumigation facility complying with all U.S. Environmental Protection Agency Federal Insecticide, Fungicide, and Rodenticide Act requirements including but not limited to the labeling requirements for each specific fumigant used at the site. Any fumigant used at the facility must be registered by the EPA and the Texas Department of Agriculture, Texas Structural Pest Control Board, or Texas Department of State Health Services, as appropriate, prior to use." Section 116.119(c)(1) allows for amendments to the "List of *De Minimis* Facilities or Sources" by the executive director for facilities or sources considered to be *de minimis*. If added to the "List of *De Minimis* Facilities or Sources," the specified facilities or sources are no longer required to obtain authorization from the TCEQ prior to construction. Therefore, the previous category of fumigation facilities, complying with all federal and state requirements, is proposed to be a *de minimis* facility or source.

The addition or deletion of a category of facilities, sources, or groups of facilities or sources to the "List of *De Minimis* Facilities or Sources" is subject to the procedural requirements of 116.119, which include a 30-day public comment period. The "List of *De Minimis* Facilities and Sources" is located on the TCEQ Web site at: *www.tceq.state.tx.us/permitting/air/newsourcereview/de_minimis.html*. Any interested or affected person has the opportunity to provide written comments pertaining to the addition or deletion of a category of facilities, sources, or groups of facilities or sources to the "List of *De Minimis* Facilities or Sources."

Comments may be mailed to Steven Hagood, Texas Commission on Environmental Quality, Office of Permitting, Remediation and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1070. All comments must be received by 5:00 p.m., February 6, 2006. To inquire about the technical review of the *de minimis* request, contact Mr. Hagood at (512) 239-1580.

TRD-200506115

Stephanie Bergeron Perdue

Acting Deputy Director, Office of Legal Services

Texas Commission on Environmental Quality

Filed: December 27, 2005

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Notice of Water Quality Applications

The following notices were issued during the period of December 21, 2005.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

CITY OF BECKVILLE has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. 10718-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 140,000 gallons per day. The facility is located approximately 0.6 mile southeast of the intersection of State Highway 149 and Farm-to- Market Road 124, adjacent to Wall Branch, south of the City of Beckville in Panola County, Texas.

THE CITY OF CORPUS CHRISTI has applied for a renewal of TPDES Permit No. WQ0010401006, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 5,000,000 gallons per day. The application also includes a request to continue the temporary variance to the existing water quality standards for the Nueces River Tidal in Segment No. 2101. The variance would authorize a three-year period in which to conduct a water quality study of the Nueces River Tidal into which the treated domestic wastewater is discharged. Prior to the expiration of the three-year variance period, the Commission will consider the site-specific standards and determine whether to adopt the standards or require the existing water quality standards to remain in effect. The facility is located at 3 Allison Lane in the northwest portion of the City of Corpus Christi approximately 1 mile north of Interstate Highway 37 in Nueces County, Texas.

CITY OF HOUSTON has applied for a major amendment to TPDES Permit No. 10495-116. The proposed amendment requests authorization to increase the two-hour peak flow from 37,500 gallons per minute (gpm) to 48,611 gpm. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 18,000,000 gallons per day. The facility is located on the northeast corner of the intersection of Old Westheimer Road and Alief-Clodine Road in the City of Houston in Harris County, Texas.

MONTGOMERY COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 has applied for a renewal of TPDES Permit No. WQ0010857001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 420,000 gallons per day. The facility is located approximately eleven miles south of the City of Conroe, three miles west of the Interstate Highway 45 crossing of Spring Creek and at the south end of Glen Loch Drive in the Timber Ridge-Timber Lake subdivision in Montgomery County, Texas.

ONYX ENVIRONMENTAL SERVICES, L.L.C. which operates the Port Arthur Facility, a hazardous waste treatment, storage, and disposal facility, has applied for a major amendment to TPDES Permit No. WQ0002417000 to authorize the use of a site-specific aluminum partitioning coefficient at Outfall 001; to remove the daily maximum effluent limitations or reduce the monitoring frequencies for total arsenic and total chromium at Outfall 001; to increase the daily maximum effluent limitations for total aluminum, total mercury, and total

zinc at Outfall 001; to change the sampling locations and procedures at internal Outfalls 201 and 301; and delete the compliance schedule for the attainment of water quality-based total cadmium, total copper, total lead, total mercury, and total aluminum final effluent limitations at Outfall 001. The current permit authorizes the discharge of previously monitored effluent (treated domestic wastewater via internal Outfall 101; and storm water runoff via internal Outfalls 201 and 301), utility wastewater and storm water runoff via Outfall 001 on an intermittent and flow variable basis. The facility is located south of State Highway 73 and approximately 3.5 miles southwest of the location where the State Highway 73 bridge crosses Taylor Bayou, Jefferson County, Texas.

FRANCES MILONE REID has applied for a renewal of TPDES Permit No. 14098-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located approximately 0.75 mile east of the intersection of State Highway 64 and State Spur 124, approximately 1.75 miles northwest of the intersection of State Highway 64 and Farm-to-Market 848 in Smith County, Texas.

ALI MOHAMMAD SOLHJOU has applied for a renewal of TPDES Permit No. 14277-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility is located approximately 1.25 miles west of Hardy Toll Road and approximately 1,300 feet south of the intersection of Gulf Bank Road and the Aldine Oaks Mobile Home Community entrance in Harris County, Texas.

WILLIAMSON COUNTY has applied for a new permit, Proposed Permit No. WQ0014574001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day via surface irrigation of 157 acres of public access land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located on the east side of Sam Bass Road (County Road 175), approximately 6,900 feet north of the intersection of Sam Bass Road and Farm-to-Market Road 1431 in Williamson County, Texas.

CITY OF WOLFE CITY has applied for a renewal of TPDES Permit No. 10383-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 195,000 gallons per day. The facility is located adjacent to Oyster Creek approximately 0.3 miles east of State Highway 34 and 0.5 miles south of Wolfe City in Hunt County, Texas.

TRD-200506120
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 28, 2005

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 6, 2006**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 6, 2006**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Carotex, Inc.; DOCKET NUMBER: 2005-1662-IWD-E; IDENTIFIER: Regulated Entity Reference Number (RN) 100213727; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: plant that treats empty petroleum tank washings and cleans and repairs chemical and petroleum barges; RULE VIOLATED: 30 TAC §305.125(1) and (17), Texas Pollutant Discharge Elimination System (TPDES) Permit Number 01674, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for chemical oxygen demand, total suspended solids, ammonia nitrogen, and total copper, and by failing to submit the effluent data for cadmium, chromium, copper, lead, nickel, and total copper on the discharge monitoring report; PENALTY: $7,068; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(2) COMPANY: Continental Cabinets Manufacturing, Inc.; DOCKET NUMBER: 2005-1759-AIR-E; IDENTIFIER: RN100221753; LOCATION: Lancaster, Dallas County, Texas; TYPE OF FACILITY: cabinet finishing; RULE VIOLATED: 30 TAC §122.146(1) and (2) and THSC, §382.085(b), by failing to submit the compliance certification; and 30 TAC §122.165(c)(1)(B) and THSC, §382.085(b), by failing to get advance approval for delegation of authority prior to submitting a compliance certification; PENALTY: $3,000; ENFORCEMENT COORDINATOR: David Flores, (512) 239-1165; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: City of Cottonwood Shores; DOCKET NUMBER: 2005-1178-PWS-E; IDENTIFIER: RN101384683; LOCATION: near Cottonwood Shores, Burnet County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and (5) and THSC, §341.0315(c), by exceeding the maximum contaminant level (MCL) for total trihalomethanes (TTHM) and haloacetic acids (HAA5); PENALTY: $635; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(4) COMPANY: Echo Hill Ranch, Inc. dba Echo Hill Ranch Youth Camp; DOCKET NUMBER: 2005-1648-PWS-E; IDENTIFIER: RN101235133; LOCATION: near Medina, Kerr County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect and submit routine bacteriological samples and by failing to notify water system customers; PENALTY: $1,220; ENFORCEMENT COORDINATOR: Marlin Bullard, (254) 751-0335; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(5) COMPANY: Enterprise Products Operating L.P.; DOCKET NUMBER: 2005-1700-IWD-E; IDENTIFIER: RN102323268; LOCATION: Mont Belvieu, Chambers County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (17), TPDES Permit Number 02940, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for ph, daily copper, and flow, and by failing to submit monitoring results for total copper; PENALTY: $5,898; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Sang Eun Woo dba Family Mart; DOCKET NUMBER: 2005-0777-PST-E; IDENTIFIER: RN101684306; LOCATION: McAllen, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(iii), by failing to post a valid, current delivery certificate; 30 TAC §334.50(b)(2)(A)(i)(III) and (d)(4)(A)(ii)(II) and the Code, §26.3475(c)(1), by failing to perform a piping tightness test for the pressurized line, by failing to test the line leak detectors, and by failing to provide proper release detection; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures; and 30 TAC §334.10(b)(1)(B), by failing to have records available for inspection; PENALTY: $7,568; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(7) COMPANY: Flint Hills Resources, L.P.; DOCKET NUMBER: 2005-1659-AIR-E; IDENTIFIER: RN100235266; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), New Source Review Flexible Air Permit Numbers 8803A and PSD-TX-413M8, and THSC, §382.085(b), by failing to comply with permitted emissions limits; and 30 TAC §101.201(b)(7) and THSC, §382.085(b), by failing to submit a complete final report; PENALTY: $3,162; ENFORCEMENT COORDINATOR: David Flores, (512) 239-1165; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(8) COMPANY: Frito-Lay, Inc.; DOCKET NUMBER: 2005-1622-IWD-E; IDENTIFIER: RN100219229; LOCATION: Rosenberg, Fort Bend County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (17), §319.1, TPDES Permit Number 02443, and the Code, §26.121(a), by failing to comply with permitted effluent limits for five-day biochemical oxygen demand and flow and by failing to submit monitoring results; PENALTY: $5,134; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: Gandaf USA, Inc. dba Speedy Mart; DOCKET NUMBER: 2005-1678-PST-E; IDENTIFIER: RN102352911; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,920; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5368; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(10) COMPANY: City of Garland; DOCKET NUMBER: 2005-1621-AIR-E; IDENTIFIER: RN100219203; LOCATION: Nevada, Collin County, Texas; TYPE OF FACILITY: electric generating station; RULE VIOLATED: 30 TAC §122.145(2) and THSC, §382.085(b), by failing to submit the semiannual deviation report; PENALTY: $1,940; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Good Time Stores, Inc.; DOCKET NUMBER: 2005-1543-AIR-E; IDENTIFIER: RN102017514; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: gasoline service station; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by allowing the transfer of gasoline with a Reid vapor pressure greater than seven maximum pounds per square inch absolute; PENALTY: $1,040; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(12) COMPANY: Hexicon Speciality Chemicals, Inc.; DOCKET NUMBER: 2005-1610-AIR-E; IDENTIFIER: RN102590775; LOCATION: Deer Park, Harris County, Texas; TYPE OF FACILITY: purification plant; RULE VIOLATED: 30 TAC §115.352(4) and §116.115(c), Permit Numbers 6949 and 18738, Federal Operating Permit Numbers O-01941 and O-01942, 40 Code of Federal Regulations (CFR) §63.167(a)(1), and THSC, §382.085(b), by failing to seal open-ended lines in hazardous air pollution service at the Epichlorohydrin Finishing Unit and the Bisphenol Acetone three and four units by use of a cap, a blind flange, a plus, or a second valve; PENALTY: $9,000; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Jefferson County Water Control and Improvement District Number 10; DOCKET NUMBER: 2005-0621-MWD-E; IDENTIFIER: TPDES Permit Number 0010838003 and RN101607448; LOCATION: Nederland, Jefferson County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 0010838003, and the Code, §26.121(a), by failing to comply with permitted effluent limits; PENALTY: $9,000; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(14) COMPANY: Horral Ingram Jones, Jr. dba Jones Septic Tank Cleaning; DOCKET NUMBER: 2005-1388-MLM-E; IDENTIFIER: RN101525566; LOCATION: near Dobbin, Montomgery County, Texas; TYPE OF FACILITY: septic tank cleaning, port-o-can rental service, and wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), by failing to measure the effluent flow, by failing to maintain a minimum of two feet of freeboard in the holding pond, by failing to maintain and operate the treatment facility to maintain optimum efficiency of treatment capability, by having excessive sludge in the clarifier, the chlorine contact chamber, and the digester, by not having any freeboard in the digester, and by failing to comply with the permitted effluent limits for biochemical oxygen demand; 30 TAC §319.11(a), by failing to sample in accordance with Standard Methods for the Examination of Water and Wastewater by not storing samples at four degrees Celsius; 30 TAC §319.7(a) and (c), by failing to maintain documentation of monitoring activities; 30 TAC §317.4(b)(3) and (4), by failing to provide a minimum of two fine screens and a bar screen prior to the fine screen and by failing to provide vector controls; 30 TAC §312.142(c), by failing to maintain a copy of the registration authorization in each vehicle; 30 TAC §312.144(a)(1), (4)(A), and (f), by failing to prominently mark waste trucks or tanks with the company name, by failing to prominently mark all waste trucks and tanks, and by failing to prominently mark the discharge valves on the waste trucks; 30 TAC §312.145(a)(2) and (3) and (b)(1)(E), by failing to provide all of the required information on trip tickets and by failing to return a copy of the trip ticket to the generator; 30 TAC §305.125(1) and §330.5(a), and the Code, §26.121(a), by failing to provide equipment to determine application rates, by failing to maintain accurate records of the volume of effluent applied as irrigation water, by failing to prevent the discharge of effluent to the irrigation area during rainfall events, by failing to design and manage the irri-

gation system to prevent ponding of effluent or nuisance conditions, by failing to prevent the unauthorized disposal of sludge, and by failing to prevent the unauthorized discharge of wastewater, chemical toilet waste, toilet deodorant solution, solids removed from septage, diesel, and melted plastic from port-o-cans; 30 TAC §312.147(b), by failing to obtain approval in writing prior to engaging in the temporary storage of chemical toilet waste; and 30 TAC §111.201 and THSC, §325.085(b), by failing to prevent unauthorized outdoor burning; PENALTY: $8,712; ENFORCEMENT COORDINATOR: Mac Vilas, (512) 239-2557; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: Kinder Morgan Texas Pipeline, L.P.; DOCKET NUMBER: 2005-1511-AIR-E; IDENTIFIER: RN102306701; LOCATION: Goodrich, Polk County, Texas; TYPE OF FACILITY: natural gas compression; RULE VIOLATED: 30 TAC §122.145(2)(B) and (C) and THSC, §382.085(b), by failing to submit a semiannual deviation report; PENALTY: $1,700; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: City of La Joya; DOCKET NUMBER: 2004-2110-MWD-E; IDENTIFIER: RN101920361; LOCATION: La Joya, Hidalgo County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.126(a), by failing to obtain the necessary authorization to commence construction of additional wastewater treatment and/or collection facilities; and 30 TAC §305.125(1) and Water Quality Permit Number 12675-001, by failing to provide equipment to determine application rates and maintain accurate records of the volume of effluent irrigated, by failing to conduct effluent sampling and monitoring for pH, by failing to manage irrigation practices to prevent ponding of effluent, by failing to prevent an unauthorized discharge of wastewater, and by failing to maintain a minimum freeboard of two feet in the stabilization ponds; PENALTY: $12,400; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(17) COMPANY: Luling Mini Mart, Inc.; DOCKET NUMBER: 2005-1591-PST-E; IDENTIFIER: RN103001848; LOCATION: near Luling, Guadalupe County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.10(b), by failing to have required UST records maintained, readily accessible, and available for inspection; and 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied on or affixed to either the top of the fill tube or to a nonremovable point; PENALTY: $4,480; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(18) COMPANY: City of Midway; DOCKET NUMBER: 2005-1226-PWS-E; IDENTIFIER: RN101193274; LOCATION: Midway, Madison County, Texas; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.113(f)(4) and (5) and THSC, §341.0315(c), by exceeding the MCL for TTHM and HAA5; PENALTY: $635; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(19) COMPANY: Kwang Ho Park dba Oak Tree Texaco; DOCKET NUMBER: 2005-1587-PST-E; IDENTIFIER: RN101891141; LOCATION: Spring, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,280; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Olsen Estates Property Owner's Association; DOCKET NUMBER: 2005-0947-PWS-E; IDENTIFIER: RN101255057; LOCATION: Mont Belvieu, Chambers County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(c)(3)(M) and (N), by failing to provide a sampling tap on the discharge line of each well and by failing to install a flow meter on each well discharge line; 30 TAC §290.44(d)(4), by failing to provide accurate metering devices at each service connection; 30 TAC §290.46(d)(2)(A), (f)(3)(D)(ii), and (j), and §290.110(b)(4), by failing to maintain the residual disinfectant concentration at a minimum of 0.2 milligrams per liter free chlorine, by failing to make available records of pressure tank inspections, an up-to-date chemical and microbiological monitoring plan and disinfectant residual monitoring results, and by failing to complete customer service inspection certifications for each new connection; and 30 TAC §290.43(d)(3), by failing to provide facilities for maintaining the air-water-volume at the design water level and working pressure; PENALTY: $1,980; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: Shelbyville Water Supply Corporation; DOCKET NUMBER: 2005-1394-PWS-E; IDENTIFIER: RN101452027; LOCATION: Shelbyville, Shelby County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and (5) and THSC, §341.0315(c), by exceeding the MCL for TTHM and HAA5; PENALTY: $635; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(22) COMPANY: Sunoco Inc. (R&M); DOCKET NUMBER: 2005-0164-AIR-E; IDENTIFIER: RN100524008; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 4157A, and THSC, §382.085(b), by failing to prevent the unauthorized emission of a highly-reactive volatile organic compound; PENALTY: $6,960; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: Texas Pacifico Transportation, Limited; DOCKET NUMBER: 2005-1152-MLM-E; IDENTIFIER: RN102923489; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: railroad maintenance yard; RULE VIOLATED: 30 TAC §324.4(1), 40 CFR §279.12(a), and THSC, §371.041, by failing to ensure that used oil is stored, collected, burned, or discharged in a manner that does not endanger the public health or the environment; and the Code, §26.121(a), by failing to obtain authorization prior to the discharge of processed wastewater; PENALTY: $20,550; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(24) COMPANY: The Kippur Corporation; DOCKET NUMBER: 2005-1203-AIR-E; IDENTIFIER: RN101694933; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: incinerator; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(b), by discharging air contaminants in such concentration and for such duration as tended to adversely affect human health or welfare; and 30 TAC §§106.8(c)(3), 106.491(b)(3)(B) and (d)(5), 116.115(c), and THSC, §382.085(b), by failing to comply with a special conditions of a permit by failing to retain copies of all required records on site

and by failing to maintain the incinerator's stack height at least six feet above the peak of the highest building; PENALTY: $15,200; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(25) COMPANY: Wright Materials, Inc.; DOCKET NUMBER: 2005-1830-MSW-E; IDENTIFIER: RN103371134; LOCATION: near Mathis, San Patricio County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste disposal; RULE VIOLATED: 30 TAC §330.5(c), by allegedly allowing the dumping of municipal solid waste without the written authorization of the commission; PENALTY: $720; ENFORCEMENT COORDINATOR: Howard Willoughby, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

TRD-200506112
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Filed: December 27, 2005

♦ ♦ ♦

Office of the Governor

Notice of Application and Priorities for the Justice Assistance Grant (JAG) Program Federal Application

The Governor's Criminal Justice Division is preparing its application for the 2006 federal Edward Byrne Justice Assistance Grant Program. The appropriation approved by Congress is currently reported as a reduction of 42% less than the previous year's award of $22.7 million.

The Governor's Criminal Justice Division proposes to fund projects that reduce violent crime.

Comments on the application or the priorities may be submitted in writing to Judy Switzer by e-mail at jswitzer@governor.state.tx.us or mailed to the Criminal Justice Division, Office of the Governor, P. O. Box 12428, Austin, Texas 78711. Comments must be received or postmarked no later than 30 days from the date of publication of this announcement in the *Texas Register*.

TRD-200506060
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: December 22, 2005

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Texas Health and Human Services Commission

Notice of Award of a Major Consulting Contract

The Health and Human Services Commission (HHSC) announces the award of contract #529-05-0003 to The Lewin Group, an entity with a principal place of business at 3130 Fairview Park Drive, Suite 800, Falls Church, Virginia, 22042. The contractor will provide consulting services related to conducting Readiness Reviews for the Managed Care Organizations (MCOs) selected as a result of the joint procurement for Medicaid and Children's Health Insurance Program (CHIP) managed care services. In addition to the Readiness Reviews conducted for the MCOs selected as a result of the joint procurement, HHSC may require additional Readiness Reviews under circumstances described in Article 2 of the RFP (e.g., a new MCO is brought into the Medicaid/CHIP managed care program).

The total value of the contract will not exceed $1,100,000.00. The contract was executed on December 20, 2005, and will expire on December 19, 2007, unless extended or terminated sooner by the parties. The Contractor must complete the Readiness Reviews and submit a final written recommendation to HHSC no later than May 22, 2006, for the MCOs selected as a result of the joint procurement. For any additional Readiness Reviews, the Contractor must complete each review at least 110 days prior to the operational start date for the MCO.

TRD-200506122
Wendy Pellow
Assistant General Counsel
Texas Health and Human Services Commission
Filed: December 28, 2005

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Cardiac Medical Solutions DBA Heartscan of N W Houston LP	L05944	Houston	00	12/12/05
Tomball	Northwest Houston Heart Center	L05958	Tomball	00	12/05/05

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Baptist St Anthony's Health System	L01259	Amarillo	79	12/13/05
Austin	ARA Imaging	L05862	Austin	03	12/02/05
Austin	Austin Radiological Association	L00545	Austin	113	12/02/05
Austin	Austin Radiological Association	L00545	Austin	114	12/13/05
Austin	Columbia St David's Healthcare System LP	L03273	Austin	61	12/14/05
Bay City	Celanese LTD Bay City Plant	L00246	Bay City	39	12/02/05
Bedford	Carter Bloodcare	L00630	Bedford	41	12/09/05
Carrollton	Tenet Health System Hospitals Dallas Inc DBA Trinity Medical Center	L03765	Carrollton	48	12/14/05
Channelview	Arctic Pipe Inspection	L05210	Channelview	01	12/19/05
Channelview	Enpro Systems LTD	L04990	Channelview	19	12/14/05
College Station	College Station Hospital LP DBA College Station Medical Center	L02559	College Station	59	12/06/05
Conroe	River Pointe Heart & Vascular Center	L05728	Conroe	03	12/13/05
Corpus Christi	South Texas Diagnostic Imaging	L05652	Corpus Christi	03	12/12/05
Corpus Christi	The Corpus Christi Medical Center Bay Area	L04723	Corpus Christi	40	12/12/05
Dallas	Heart Consultants of North Texas	L05898	Dallas	01	12/16/05
Dallas	Maxum Health Services Corp DBA Insight Diagnostic Center	L05904	Dallas	01	12/02/05
Dallas	Pet Net Pharmaceuticals Inc	L05193	Dallas	19	12/15/05
Denton	Metro North Clinic	L05235	Denton	08	12/07/05
Diboll	Tin Inc DBA Temple Inland Fiber Products Operation	L00935	Diboll	26	12/13/05
Eagle Pass	Fort Duncan Medical Center	L05640	Eagle Pass	03	12/13/05
Edinburg	Doctors Hospital at Renaissance LTD DBA Doctors Hospital at Renaissance	L05761	Edinburg	08	12/13/05
El Paso	Tenet Hospitals Limited DBA Sierra Medical Center	L04758	El Paso	19	12/15/05
El Paso	The University of Texas at El Paso Radiation Safety Office	L00159	El Paso	49	12/13/05
Fort Worth	Baylor All Saints Medical Center	L2212	Fort Worth	70	12/05/05
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	98	12/19/05
Fort Worth	Physician Reliance LP DBA Texas Oncology at Klabzuba	L05545	Fort Worth	11	12/14/05
Fort Worth	Precision Energy Services Inc	L00747	Fort Worth	71	12/01/05
Garland	Baylor Medical Center at Garland	L01565	Garland	37	12/13/05
Grapevine	Baylor Medical Center at Grapevine	L03320	Grapevine	23	12/15/05
Hallsville	Southwestern Electric Power Company	L03297	Hallsville	15	12/15/05
Harlingen	Harlingen Medical Center	L05587	Harlingen	02	12/16/05
Hereford	Hereford Regional Medical Center	L03111	Hereford	12	12/05/05
Houston	Christus Health Gulf Coast DBA Christus St Joseph Hospital	L02279	Houston	59	12/15/05

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Houston Cyclotron Partners LP DBA Cyclotope	L05585	Houston	06	12/16/05
Houston	Houston Northwest Medical Center	L02253	Houston	65	12/15/05
Houston	Medi Physics Inc DBA GE Healthcare	L05517	Houston	08	12/05/05
Houston	Memorial Hermann Hospital System Inc DBA Memorial Hermann Hospital	L00650	Houston	75	12/05/05
Houston	M-I LLC	L02761	Houston	08	12/15/05
Houston	New Medical Horizons II LTD DBA Cypress Fairbanks Medical Center	L03424	Houston	27	11-30-05
Houston	Nuclear Imaging Services LLC	L05775	Houston	14	12/08/05
Houston	Stewart & Stevenson Service Inc	L05267	Houston	01	12/16/05
Houston	Tuboscope Vetco International Inc	L05302	Houston	02	12/16/05
Houston	University of Houston Clear Lake	L02108	Houston	17	12/15/05
Humble	Cardiovascular Association PLLC	L05421	Humble	06	12/02/05
Humble	Mohan Jacob MD PA	L04442	Humble	07	12/02/05
Irving	Baylor Medical Center at Irving DBA Irving Healthcare System	L02444	Irving	60	12/14/05
Kerrville	Sid Peterson Memorial Hospital	L01722	Kerrville	33	12/16/05
La Porte	J V Industrial Co LTD	L05785	La Porte	05	12/05/05
McKinney	Cardiac Center of Texas PA	L05744	McKinney	05	12/12/05
Mount Pleasant	DX Imaging LTD DBA Open Imaging of Mount Pleasant	L05445	Mount Pleasant	07	12/12/05
Nassau Bay	Christus Health DBA Christus St John Hospital	L03291	Nassau Bay	25	12/15/05
New Braunfels	Cancer Care Network of South Texas PA	L05717	New Braunfels	07	11/30/05
New Braunfels	Cancer Care Network of South Texas PA	L05717	New Braunfels	08	12/06/05
Orange	Chevron Phillips Chemical Company LP	L00031	Orange	55	12/05/05
Orange	Invista Inc	L05777	Orange	02	12/05/05
Palestine	Palestine Principal Healthcare LP DBA Palestine Regional Medical Center	L02728	Palestine	39	12/01/05
Pasadena	Celenese LTD Clear Lake Plant	L01130	Pasadena	63	12/14/05
Pasadena	Marathon Pipe Line LLC	L05303	Pasadena	04	12/13/05
Pasadena	Nuclear Medicine Associates PA	L05712	Pasadena	04	12/13/05
Pasadena	Syngenta Crop Protection Inc	L02216	Pasadena	28	12/13/05
Plano	Texas Regional Heart Center PA DBA Legacy Heart Center	L03704	Plano	29	12/15/05
San Antonio	Medical and Radiation Physics Inc	L01417	San Antonio	21	12/12/05
San Antonio	Methodist Healthcare System of San Antonio DBA Methodist Hospital	L00594	San Antonio	214	12/01/05
San Antonio	PetNet Pharmaceuticals Inc DBA PetNet San Antonio	L05569	San Antonio	09	12/16/05
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	142	12/07/05
San Antonio	South Texas Radiology Imaging Centers	L03518	San Antonio	49	12/07/05
San Antonio	VHS San Antonio Partners LP DBA Baptist Health System	L00455	San Antonio	149	12/16/05
Seguin	Guadalupe Regional Medical Center	L02292	Seguin	28	12/07/05
The Woodlands	Memorial Hospital The Woodlands	L03772	The Woodlands	45	12/15/05
Tomball	Northwest Heart Center	L05296	Tomball	01	12/06/05
Tyler	East Texas Medical Center	L00977	Tyler	127	12/05/05
Waco	Baylor University	L01136	Waco	23	12/15/05
Waco	Texas Oncology PA Cancer Care & Research Center	L05940	Waco	01	12/05/05
Waco	Texas Oncology PA DBA Cancer Care & Research Center	L05940	Waco	02	12/12/05

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Wharton	Wharton Hospital Corporation DBA Gulf Coast Medical Center	L01388	Wharton	41	12/14/05
Wichita Falls	Clinics of North Texas LLP	L00523	Wichita Falls	47	12/14/05
Throughout TX	Team Cooperheat-MQS Inc DBA Cooperheat – MQS	L00087	Alvin	133	12/19/05
Throughout TX	Phoenix Non Destructive Testing Co Inc	L04454	Channelview	45	12/13/05
Throughout TX	Texas A&M University Environmental Health & Safety Department	L05683	College Station	02	11/30/05
Throughout TX	Valero Refining - Texas LP	L03360	Corpus Christi	22	12/08/05
Throughout TX	Champagne - Webber Inc Texas	L04904	Corsicana	09	12/15/05
Throughout TX	Alliance Geotechnical Group Inc	L05314	Dallas	09	12/15/05
Throughout TX	Alliance Imaging Inc	L05336	Dallas	10	12/01/05
Throughout TX	Cardinal Health	L02048	Dallas	116	12/01/05
Throughout TX	Aitec USA Inc	L05718	Houston	16	12/05/05
Throughout TX	Fugro Consultants LP	L00058	Houston	48	12/19/05
Throughout TX	Irisndt Inc	L04769	Houston	22	12/13/05
Throughout TX	Nuclear Scanning Services Inc	L04339	Houston	19	12/16/05
Throughout TX	QC Laboratories Inc	L04750	Houston	13	12/07/05
Throughout TX	Roxar Inc	L05547	Houston	07	12/13/05
Throughout TX	Texas Genco II LP	L02063	Houston	62	12/13/05
Throughout TX	Acuren Inspection Inc	L01774	La Porte	217	12/05/05
Throughout TX	Acuren Inspection Inc	L01774	La Porte	218	12/13/05
Throughout TX	Southern Services Inc DBA Southern Technical Services DBA Bix Testing Laboratories	L05270	Lake Jackson	44	12/15/05
Throughout TX	Southern Services Inc DBA Southern Technical Services DBA Bix Testing Laboratories	L05270	Lake Jackson	43	12/13/05
Throughout TX	Master Industries Inc	L05872	Liberty	03	12/14/05
Throughout TX	Pickett Jacobs Consultants Inc A Terracon Company	L03690	Lufkin	19	12/06/05
Throughout TX	Eagle X-Ray	L03246	Mont Belvieu	89	12/12/05
Throughout TX	T C Inspection Inc	L05833	Oyster Creek	08	12/05/05
Throughout TX	Conam Inspection & Engineering Inc	L05010	Pasadena	100	12/15/05
Throughout TX	Texas Gamma Ray LLC	L05561	Pasadena	60	12/08/05
Throughout TX	Midwest Inspection Services	L03120	Perryton	83	12/01/05
Throughout TX	GCT Inspection Inc	L02378	South Houston	88	12/14/05
Throughout TX	General Electric Company Medical Systems	L05653	Spring Branch	02	12/14/05
Throughout TX	Schlumberger Technology	L01833	Sugar Land	128	12/02/05
Throughout TX	BP Products North America Inc	L00254	Texas City	58	12/07/05
Throughout TX	BJ Services Company USA	L02684	Tomball	50	12/14/05
Throughout TX	Apex Geoscience Inc	L04929	Tyler	24	12/01/05
Throughout TX	TSI Laboratories	L04767	Victoria	07	12/14/05

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	ARMC LP DBA Abilene Regional Medical Center	L02434	Abilene	75	12/06/05
Austin	Austin Eye Clinic Association	L01642	Austin	10	12/20/05
San Antonio	Accord Medical Management LP DBA Nix Health Care System	L03531	San Antonio	25	12/13/05
Throughout TX	John E Hearne DBA Hearne Wireline Service	L05174	Asherton	04	12/16/05
Throughout TX	City of Waco	L05160	Waco	02	12/14/05
Throughout TX	Young Contractors Inc	L04095	Waco	18	12/14/05

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC), Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200506104
Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 23, 2005

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Registrant Becker-Parkin Dental Supply Company, Inc.

Notice is hereby given that the Department of State Health Services (department) issued a notice of violation and proposal to assess an administrative penalty to Becker-Parkin Dental Supply Co., Inc. (registrant #R19293-001) of Hempstead, NY. A total penalty of $4,000 is proposed to be assessed to the registrant for alleged violations of 25 TAC Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday - Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200506102
Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 23, 2005

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Registrant Daryl Robertson, D.D.S.

Notice is hereby given that the Department of State Health Services (department) issued a notice of violation and proposal to assess an administrative penalty to Daryl Robertson, D.D.S. (unregistered), of Borger. A total penalty of $4,000 is proposed to be assessed to the registrant for alleged violations of 25 TAC Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday - Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200506100
Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 23, 2005

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Registrant Henry Schein, Inc., dba Sullivan-Schein Dental Products

Notice is hereby given that the Department of State Health Services (department) issued a notice of violation and proposal to assess an administrative penalty to Henry Schein, Inc., dba Sullivan-Schein Dental Products (registrant #R18006-005) of Grapevine. A total penalty of $20,000 is proposed to be assessed to the registrant for alleged violations of 25 TAC Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday - Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200506103

Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 23, 2005

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Registrant Island Dental Supply Company, Inc.

Notice is hereby given that the Department of State Health Services (department) issued a notice of violation and proposal to assess an administrative penalty to Island Dental Supply Company, Inc. (registrant #R26297-000) of Arlington. A total penalty of $4,000 is proposed to be assessed to the registrant for alleged violations of 25 TAC Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday - Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200506101
Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 23, 2005

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Texas Department of Housing and Community Affairs

Notice of Public Hearing

Multifamily Housing Revenue Bonds (The Park at Oak Grove Apartments) Series 2006

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Carter Park Elementary School, 1204 East Broadus Avenue, Fort Worth, Tarrant County, Texas 76115, at 6:00 p.m. on January 24, 2006 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $13,700,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Tarrant County Partners II, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing, and equipping a multifamily housing development (the "Development") described as follows: 247-unit multifamily residential rental development located at approximately 1029 Oak Grove Road and in approximately the northeast quadrant of Interstate Highway 20 and Oak Grove Road, Tarrant County, Texas. A physical address has not been assigned by the City of Fort Worth. Upon the issuance of the Bonds, the Development will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Teresa Morales at the Texas Department of Housing and Community Affairs, P. O. Box 13941 Austin, TX 78711-3941; (512) 475-3344; and/or teresa.morales@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Teresa Morales in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Teresa Morales prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Teresa Morales at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200506081
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 22, 2005

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Notice of Public Hearing

Multifamily Housing Revenue Bonds (Bella Vista Apartments) Series 2006

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Robert E. Lee Intermediate, 2100 N. Grand Avenue, Gainesville, Cooke County, Texas 76240, at 6:00 p.m. on January 26, 2006 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $6,850,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to UHF Gainesville Housing, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing, and equipping a multifamily housing development (the "Development") described as follows: 144-unit multifamily residential rental development located approximately between the 2000 and 2200 blocks of N. Grand Avenue and on the west side of N. Grand Avenue, Cooke County, Texas. A physical address has not been assigned by the City of Gainesville. Upon the issuance of the Bonds, the Development will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Teresa Morales at the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941; (512) 475-3344; and/or teresa.morales@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Teresa Morales in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Teresa Morales prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Teresa Morales at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200506117

Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 27, 2005

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Texas Department of Insurance

Amended Notice of Reconvening of 2004 Texas Title Insurance Biennial Hearing--Ratemaking Phase

This is an amendment to the Notice of Reconvening of the 2004 Texas Title Insurance Biennial Hearing as published in the December 9, 2005, issue of the *Texas Register* (30 TexReg 8321) to reflect a change in the date and time of the continued Ratemaking Phase of the Biennial Hearing.

The Commissioner of Insurance will hold a public hearing under Docket No. 2601 on Tuesday, March 7, 2006, at 9:30 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, and continuing thereafter at dates, times, and places designated by the Commissioner until conclusion. This is notice of the reconvening of the continued Ratemaking Phase of the 2004 Texas Title Insurance Biennial Hearing that was originally set on December 31, 2004, as published in the October 15, 2004, issue of the *Texas Register* (29 TexReg 9718).

The Commissioner of Insurance has jurisdiction over the promulgation of rules and premium rates, over amendments to or promulgation of approved forms, and over other matters set out in this notice pursuant to Texas Insurance Code, §31.021 and Chapters 2501 and 2703 and §2551.003, and pursuant to the Texas Administrative Code, Title 28, Chapter 9. The procedure of the hearing will be governed by the Rules of Practice and Procedure before the Department of Insurance (Texas Administrative Code, Title 28, Chapter 1, Subchapter A) and the Administrative Procedure Act (Texas Government Code, Chapter 2001).

TRD-200506116
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: December 27, 2005

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Company Licensing

Application for admission to the State of Texas by ACE LIFE INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Stamford, Connecticut.

Application for admission to the State of Texas by AMERICAN SOUTHERN HOME INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Jacksonville, Florida.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200506125
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: December 28, 2005

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Panhandle Regional Planning Commission

Invitation for Bids

The Panhandle Regional Planning Commission (PRPC) is soliciting bids to purchase thirty (30) personal computers (PCs) and related equipment. To comply with our funding agency's requirements, PRPC will only accept bids for PCs produced by:

* Tier1/Tier2 manufacturers as designated by the Gartner Group. Tier 1/Tier 2 manufacturers include: Acer, AST, Compaq, Digital, Dell, Gateway, HP, IBM, Micron, NEC, Unisys, and Zenith Data Systems; or

* Vendors listed on the Texas Building and Procurement Commission's (TBPC) Centralized Master Bidders List (CMBL) .

A copy of the Invitation for Bids can be obtained by contacting Leslie Hardin, PRPC's Workforce Development Facilities Coordinator, at (806) 372-3381 or lhardin@prpc.cog.tx.us. Proposals must be received at PRPC by 3:00 p.m. on January 20, 2006.

TRD-200506083
Leslie Hardin
Facilities Coordinator
Panhandle Regional Planning Commission
Filed: December 22, 2005

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Invitation for Bids

The Panhandle Regional Planning Commission (PRPC) is soliciting bids to purchase rack mount server hardware, software and related equipment. A copy of the Invitation for Bids can be obtained by contacting Leslie Hardin, PRPC's Workforce Development Facilities Coordinator, at (806) 372-3381 or lhardin@prpc.cog.tx.us. Proposals must be received at PRPC by 3:00 p.m. on January 20, 2006.

TRD-200506084
Leslie Hardin
Facilities Coordinator
Panhandle Regional Planning Commission
Filed: December 22, 2005

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Invitation for Bids

The Panhandle Regional Planning Commission (PRPC) is soliciting bids for a contract to provide Broadband Internet service to the Panhandle region's Texas Workforce Centers. The Texas Workforce Center facilities require Broadband Internet presence with static IP only (excluding e-mail service and telephone) in as many of the following eight locations as possible:

* Guaranteed speed no less than 2.5Mbps both up and down for the following:

(1) Amarillo, 1206 W. 7th, 79101

(2) Amarillo, 905 S. Fillmore, Suite 610, 79101

(3) Borger, 901 Opal, Room 102, 79007

(4) Hereford, 121 W. Park Ave., 79045

* Guaranteed speed no less than 1Mbps both up and down for the following:

(5) Childress, 210 Commerce Street, 79201

(6) Dumas, 500 East 1st, 79029

(7) Pampa, NBC Plaza, 1224 N. Hobart, Suite 101, 7906

(8) Tulia, 310 W. Broadway Ave., 79088

A copy of the Invitation for Bids can be obtained by contacting Leslie Hardin, PRPC's Workforce Development Facilities Coordinator, at (806) 372-3381 or lhardin@prpc.cog.tx.us. Bids must be received at PRPC by 3:00 p.m. on January 20, 2006.

TRD-200506085
Leslie Hardin
Facilities Coordinator
Panhandle Regional Planning Commission
Filed: December 22, 2005

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Request for Proposals

The Panhandle Regional Planning Commission (PRPC) is requesting proposals for a contract to provide network/telephone drop installation and verification service to the Panhandle region's Texas Workforce Centers. A copy of the Request for Proposals can be obtained by contacting Leslie Hardin, PRPC's Workforce Development Facilities Coordinator, at (806) 372-3381 or lhardin@prpc.cog.tx.us. Proposals must be received at PRPC by 3:00 p.m. on January 20, 2006.

TRD-200506082
Tom Dressler
Workforce Development Director
Panhandle Regional Planning Commission
Filed: December 22, 2005

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Public Utility Commission of Texas

Announcement of Application for Amendment to State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 20, 2005, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to Public Utility Regulatory Act (PURA) §§66.001 - 66.016. A summary of the application follows.

Project Title and Number: Application of GTE Southwest, Incorporated, doing business as Verizon Southwest, to Amend its State-Issued Certificate of Franchise Authority, Project Number 32188 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 32188.

TRD-200506086
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 22, 2005

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Texas State Soil and Water Conservation Board

Request for Proposal

INTRODUCTION

This document provides instructions and guidance for submitting proposals for projects seeking funding under the Clean Water Act (CWA) §319(h) grant program in Texas. Each year Congress appropriates federal funds that are distributed to the Texas State Soil and Water Conservation Board (TSSWCB) through the U. S. Environmental Protection Agency (EPA) under the authorization of §319(h) of the CWA. TSSWCB then administers/awards these federal funds as grants for activities that address the goals and objectives stated in the Texas Nonpoint Source Management Program Report. This document can be accessed online at *http://www.tsswcb.state.tx.us/reports/2005mgmtprogram.pdf.*

The types of agricultural/silvicultural NPS activities that can be funded with §319(h) grants include the following: implementation projects, demonstrations, technical assistance, watershed planning, public outreach/education projects, development of watershed protection plans, and monitoring activities to determine the effectiveness of specific pollution prevention methods. Research activities are not eligible for §319(h) grant funding.

The TSSWCB is requesting proposals for watershed assessment, planning, implementation, demonstration and education projects within the boundaries of impaired or threatened watersheds as well as watershed protection projects in unimpaired watersheds. Up to $2 million of the TSSWCB's CWA §319(h) grant will be eligible for this RFP. Approximately $1 million will be targeted to Implementation and Education; $800,000 will be targeted to Watershed Planning and Assessment. No more than ten percent of this RFP can be utilized for groundwater projects. A competitive proposal process will be used so that the most appropriate and effective projects are selected for funding.

Project proposals should, where applicable, stress interagency coordination, demonstrate new or innovative technologies or institutional approaches, use approaches that have statewide applicability, use comprehensive approaches, and stress public participation and technology transfer.

This request for proposals does not set a maximum or minimum amount for projects; however, project funding generally ranges between $100,000 and $400,000. TSSWCB will administer funds to grantees by reimbursement for eligible expenses for a period not to exceed three (3) years. The non-federal share of the funding must be at least 40% of the total award. Monthly, quarterly, and final project reports are the minimum reporting requirements. Deliverables for general distribution (i.e., videos, news releases, literature) will be submitted to EPA for approval through the TSSWCB.

ELIGIBLE ORGANIZATIONS

Grants will be available to public and private entities such as local governments, educational institutions, non-profit organizations, and state agencies. Private organizations, for profit, may participate in projects as partners or contractors but may not apply directly for funding.

SELECTION PROCESS

Submitted proposals will be reviewed, scored, and ranked based on the evaluation and ranking criteria. A minimum scoring requirement (70 points) is necessary for proposals to be eligible for consideration.

Applicants whose proposals are recommended for funding will be notified and will be assigned to a TSSWCB project manager. The project manager will work with the applicant to amend and finalize the proposal prior to submittal to EPA. EPA will review and approve all proposals prior to TSSWCB awarding grant funds.

SUBMISSION PROCESS

To obtain a complete copy of TSSWCB's proposal submission packet, please visit *www.tsswcb.state.tx.us/programs/319/fy06rfp.doc* or contact a member of the Nonpoint Source Team at (254) 773-2250. Submit

proposals electronically to *thelton@tsswcb.state.tx.us* and mail 6 hard copies to the address below. Proposals must be received no later than February 17, 2006 to be considered.

Address Proposals to:

Attn: Nonpoint Source Team

Texas State Soil and Water Conservation Board

P. O. Box 658

Temple, TX 76503

FY 2006 GRANT TIMELINE

Issuance of RFP, January 6, 2006; Deadline for Submission of Proposals, February 17, 2006; Proposal Evaluation, February - March 2006; Begin Working with Applicants to Finalize Proposal, March 2006; Workplan Approval, Spring 2006; Finalize Project Agreements, Spring 2006; Notification of Selected Proposals/Unsuccessful Applicants, Spring 2006; Contract Award, Summer 2006; Project Start Date, September 1, 2006.

TRD-200506095

Mel Davis

Special Projects Coordinator

Texas State Soil and Water Conservation Board

Filed: December 22, 2005

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).